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In the Supreme Court of the United States

October Term, 1984

EVA KOLLSMAN, CITY NATIONAL BANK,
as Special Administrators of the Estate of
Paul Kollsman, deceased,

Petitioners,

v.

CITY OF LOS ANGELES,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Because of the harmful effects of delay on the parties and the impact on both state and federal judicial systems of trial, should the determination whether to abstain be primarily a *pre-trial* determination, so years of litigational effort by both court and counsel are not wasted by a hindsight post-trial review? When abstention has been denied and a trial on the merits has been concluded, is it a better use of limited judicial resources to review the merits of the case rather than "armchair quarterbacking" the pre-trial abstention decision?

2. When the District Court has refused four requests to abstain and the Court of Appeals has denied a pretrial Petition for Writ of Mandate seeking to compel abstention, is it error for the Court of Appeals to re-examine the abstention issue after the case has been fully tried on the merits, order abstention, and compel the parties (after seven years of Federal Court litigation) to begin anew in state court?

3. Is it proper for the Ninth Circuit Court of Appeals to decide that, in land use planning and zoning cases, the District Courts have no discretion to consider the merits and that abstention in favor of state court adjudication is mandatory? Ought such a rule — which contradicts *all* decisions of this Court on abstention — survive as precedent in the largest Circuit in the Nation?

4. In determining whether a state law issue is a matter of sufficient local sensitivity to require abstention, is it proper for the Ninth Circuit Court of Appeals (in contrast to all other Courts of Appeals to consider the issue) to conclude that land use planning and zoning cases are almost *always* so sensitive that abstention is required? Otherwise expressed, are planning and zoning cases any more locally sensitive than public school, motor vehicle,

and prison condition cases which Federal Courts routinely decide?

5. In determining whether state law is so uncertain that abstention is mandatory, is it sufficient for a Court of Appeals merely to note (without analysis) that counsel for one of the litigants says he disagrees with the District Court's interpretation?

6. Is abstention mandatory when a substantial federal issue will remain regardless of the outcome of state litigation?

7. When a case pending in the District Court contains both Federal Constitutional issues and state statutory issues and is fully tried as to all issues, is it appropriate for the District Court to decide a state statutory issue first, in an effort to avoid reaching Federal Constitutional issues? If a District Court does that in compliance with cases such as *City of Mesquite v. Alladin's Castle, Inc.* (1982) 455 US 283, 294-295, is it error for a Court of Appeals to vacate and order abstention?

PARTIES

All parties are listed in the caption.

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CITY OF LOS ANGELES,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported as *Kollsman v. City of Los Angeles* (9th Cir 1984) 737 F 2d 830. The Court of Appeals (by a 2-1 vote) vacated the District Court's judgment and ordered abstention. The District Court's opinion (App. C) is reported as *Kollsman v. City of Los Angeles* (CD Cal 1983) 565 F Supp. 1081.

JURISDICTION

This is a land use planning case in which the property owner, Mr. Kollsman,[1] sought a determination as a matter of Federal Constitutional law that the City's regulation of his vacant land in such a way that no economically viable use could be made of it violated the due process and equal protection guarantees and constituted a taking of his 85 acre property for public use (open space) without compensation. He asked both injunctive and compensatory relief. Jurisdiction was based on 28 USC §1331. When the complaint was filed, Tashi Land Corp. (wholly owned by Mr. Kollsman) was the titular owner of the subject property. As it was a New York resident, jurisdiction was also based on 28 USC §1332.[2] When the complaint was amended to seek relief pursuant to the Civil Rights Act (42 USC §1983), jurisdiction was additionally founded on 28 USC §1343. Mr. Kollsman also sought relief pursuant to California law, under both the District Court's pendent and diversity jurisdiction. Cal Govt Code § §65950 and 65956 provide that, when a subdivision application is not acted on by a city within one year, it is deemed approved.

After trial on the merits of the Federal Constitutional issues as well as the pendent state issue, the District Court entered judgment on the state issue only, deeming Mr. Kollsman's subdivision approved, while reserving jurisdiction over the Federal Constitutional issues.

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[1] Mr. Kollsman died at age 82, knowing that the District Court had ruled in his favor but without seeing the judgment entered. His widow and City National Bank, co-Special Administrators of his estate for his California property, were substituted in his stead on appeal. As the record refers to Mr. Kollsman as the property owner, this Petition will do likewise for clarity and consistency.

[2] Tashi Land Corp. was later dissolved and its only asset (the subject property) distributed to Mr. Kollsman.

The District Court's judgment (App. D) and it's opinion (App. C), including findings, were filed February 1, 1983.

The Court of Appeals' judgment (App. A) vacating the District Court's judgment and ordering abstention by a 2-1 vote (Judge Reinhardt dissenting), was filed July 17, 1984. The timely Petition for Rehearing was denied September 5, 1984 (App. B).

This Court's jurisdiction is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This Petition deals primarily with the abstention doctrine, a judge-made concept, which has no Constitutional or statutory genesis.

The District Court's judgment was based on California statutes, primarily Cal Govt Code § §65950 and 65956. They are reproduced in App. E.

STATEMENT OF THE CASE[3]

Mr. Kollsman owned 85 acres of vacant hillside land in a valuable, desirable area of the City of Los Angeles, adjacent to an estate on which he lived. The property had been acquired over a period of decades with the idea of creating a high quality, luxury subdivision. Thus, although the zoning on the property would have permitted 247 homes on the 85 acres, Mr. Kollsman (after lengthy study and consultation with neighbors and government officials) proposed only 70 homes.

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[3]This statement is based on the District Court's findings (App. C). The opinion of the Court of Appeals (App. A) did not overturn any findings or conclude that they were unsupported. To the extent that its factual recitation deviates from the findings, it appears to be improper. (Compare *Inwood Laboratories v. Ives Laboratories* |1982| 456 US 844, 855-857; *CIR v. Duberstein* |1960| 363 US 278, 291-292.)

The day after Mr. Kollsman submitted his tentative tract map (the first step in subdivision approval), the City adopted a part of its general plan which contained a regulatory device called the "slope density formula." The formula was intended to severely restrict development in some hillside areas. It applied to the Kollsman property.

In fact, the "slope density formula" is so restrictive that appraisers for *both* sides agreed at trial that its application to Mr. Kollsman's land (allowing only 9 homes on his 85 acres) deprived the property of any economically viable use.

The City's appraiser said " . . . development . . . would not have been economically feasible." (RT [1979] 762)

Mr. Kollsman's appraiser concluded:

> ". . . the 85 acres for subdivision purposes has no value. It would show a negative result, a loss." (RT [1979] 158)

The case was tried in 1979 on the Federal issues of due process, equal protection, and inverse condemnation.

A year later, with no decision forthcoming, Mr. Kollsman sought leave to amend his complaint to add a state law cause of action, to give the District Court the opportunity to base its judgment (at least in part) on non-Constitutional grounds, as this Court has repeatedly taught. During the pendency of the litigation, the California legislature completed enactment of a series of statutes designed to encourage construction of housing, ease the process of obtaining permits, and speed the process of land development. Cal Govt Code § §65950 and 65956 require a city to act on land development applications within one year or they are deemed approved.

In 1981, the District Court heard additional testimony on the state law issue.

Two years later, in 1983, the District Court found that Mr. Kollsman had done all that was required of him, that the City had acted in bad faith in refusing to process his subdivision proposal, and that the proposal must be deemed approved. (App. C, pp C-29-30) Judgment was entered on this issue only, with jurisdiction over the already-tried Federal Constitutional issues still held in abeyance. (App. D)[4]

During the litigation, the City repeatedly asked the District Court to abstain. Four times, these requests were denied. In 1978, the City sought a writ of mandate from the Court of Appeals to compel abstention. After full briefing by both sides, the writ was denied. (See App. C, p C-3.)

Then, in 1984, seven years after the litigation began and after a full trial on the merits of all issues, the Court of Appeals (over Judge Reinhardt's vigorous dissent) decided that abstention was required. In so doing, the Ninth Circuit:

- reinforced its own peculiar rule that abstention is the *rule* in land use planning and zoning cases, rather than the exception in all cases;
- decided that land use planning and zoning cases are *always* matters of extreme local sensitivity which require abstention (apparently unlike cases involving public schools, motor vehicles, and prison conditions, which are not);
- concluded that a District Court has virtually *no* discretion to entertain a land use planning or zoning case on its merits without first abstaining;

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[4]Interim damages for the period during which development was prohibited remained to be determined. (See *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621 [Brennan, J., dissenting].) The amount could not be determined until after development.

- held that the mere fact that counsel for one of the litigants says he disagrees with a District Court's interpretation of state law *automatically* demonstrates the uncertainty of state law and requires abstention; and
- ignored generations of this Court's holdings that decisions ought to be based on non-Constitutional grounds where possible.

Because the Federal Constitutional issues had already been fully tried and awaited only the preparation of findings and a judgment, and in order to end this litigation economically (which ought to be in the interest of all litigants and *both* judicial systems), Mr. Kollsman's heirs offered (in their Petition for Rehearing) to forego any attempt at relief under California law. Instead, they asked that the case be remanded to the District Court for determination of the Federal Constitutional issues.[5] They remain willing to do that.

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[5]This was the solution preferred by Judge Reinhardt in dissent. He believed the District Court's application of state law to the facts was erroneous. Rather than abstain, he urged remand for determination of the Federal Constitutional issues. (See App. A, pp A-28-31.)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Ninth Circuit Court of Appeals has created its own backwater of abstention law which is at odds with this Court's consistent teachings. As the largest Circuit Court in the Nation, there is a need to bring its holdings into harmony with this Court's paramount holdings. These aberrant holdings have been developing over the last eight years. It is time for this Court to halt the nonconformity.

This Court has consistently held that abstention is an ". . . extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it . . ." (*Colorado River Water Cons. Dist. v. U.S.* [1976] 424 US 800, 813; quoting with approval.) As this Court recently concluded:

> "But we emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, see n 29, *supra,* the presence of federal-law issues must always be a major consideration weighing against surrender." (*Moses H. Cone Hosp. v. Mercury Const.* [1983] __ US __, 74 L Ed 2d 765, 786; emphasis, the Court's.)

The Ninth Circuit's rule is in sharp contrast to this Court's, at least in land use planning and zoning cases. As Judge Reinhardt lamented in his dissent:

> "By attempting to make abstention the absolute rule in zoning cases rather than the exception in all cases, the majority does a disservice to the litigants, who deserve, at a minimum, a reasonably prompt resolution of the federal issues that are determinative of this lawsuit." (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 844 [App. A, p A-30]; Reinhardt, J. dissenting)

In land use planning and zoning cases, the Ninth Circuit has stripped District Courts of their discretion. It has concluded that such cases *automatically* involve highly sensitive matters of local concern. It has concluded that the mere expression of disagreement with the District Court's interpretation of state law by counsel for one of the litigants is sufficient to establish uncertainty and *mandate* interpretation by state courts — with all its attendant delay — before adjudicating the Federal issues.

The majority has gutted the elementary duty of District Courts to try cases within their jurisdiction. It has stood the abstention doctrine on its head by commanding abstention in virtually all land use planning and zoning cases.

This court's attention is sorely needed to return the law of the Ninth Circuit to that of the Nation.

ABSTENTION IS PROPERLY A PRE-TRIAL DECISION, WHICH CONSERVES THE RESOURCES OF THE LITIGANTS AND BOTH JUDICIAL SYSTEMS, RATHER THAN A POST-TRIAL DECISION REQUIRING MULTIPLE TRIALS ON THE MERITS

The abstention doctrine seeks to serve a dual purpose. It attempts to avoid Federal/state friction by not having Federal courts unnecessarily decide issues of state law. It also attempts to conserve judicial resources by having uncertain state law issues determined by the courts with the jurisdiction and primary interest in deciding them. (*Railroad Comm'n v. Pullman Co.* [1941] 312 US 496, 500)

Abstention necessarily creates some delay, while a case remains in a "holding pattern" in District Court awaiting the outcome of state court determination of state law issues. Because of the adverse impact of delay, this Court has repeatedly cautioned that the impact of delay deserves to be weighed when deciding whether to abstain. (See, e.g., *Bellotti v. Baird* [1976] 428 US 132, 150; *Mayor v. Educational Equality League* [1974] 415 US 605, 628; *Hostetter v. Idlewild Liquor Corp.* [1964] 377 US 324, 329; *Public Util. Com. v. United Fuel Gas Co.* [1943] 317 US 456, 462-463; Tribe, *American Constitutional Law* [1978] §3-40 at 151.)

The economy benefit of abstention is not available if abstention is ordered by an appellate court after trial on the merits.

Abstention is, by its nature, a *pre-trial* determination. It determines where trial will take place. To conserve limited judicial resources (in *both* state and Federal systems), the

District Court's pre-trial determination ought to stand unless reversed in an extraordinary writ proceeding before trial.

To do otherwise, and permit appellate courts to second guess trial judges after trial has already been had and command not one, but *two* additional trials,[6] is profligate. As the D.C. Circuit Court of Appeals recently expressed it:

> "We do not believe that a decision to abstain at this late date [i.e., after trial] would serve the purposes that animate the abstention principle, and we decline to order a complete relitigation of this case in the local courts." (*Spivey v. Barry* [DC Cir 1981] 665 F 2d 1222, 1229)

The decision of the Ninth Circuit in this case is plainly at odds with the realistic assessment of the D.C. Circuit in *Spivey*. Judge Reinhardt's dissent, by contrast acknowledges the need to infuse abstention decisions with realism and practicality:

> "The suit has already outlived the original plaintiff, Paul Kollsman. The Kollsman estate will be most fortunate indeed if it is able to resolve even the simple and unimportant state law aspect of this litigation by 1987 — ten years after the time the original application was filed. The case will then return to the federal courts for resolution of the federal issues unless by that time the plaintiffs have abandoned their rights in despair. In my opinion, we have a legal duty to exercise our jurisdiction now.
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> * * *

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[6] Please recall that the upshot of a post-trial abstention order (such as issued by the Court of Appeals at bench) is to wipe out the trial which already occurred, send the parties to state court for a trial (and appeal) of state law issues, and then conduct yet another Federal trial on the Federal issues.

> "By attempting to make abstention the absolute rule in zoning cases rather than the exception in all cases, the majority does a disservice to the litigants, who deserve, at a minimum, a reasonably prompt resolution of the federal issues that are determinative of this lawsuit. We should allow the already long delayed dispute to proceed to an orderly resolution. The abstention doctrine and its accompanying delay should be reserved for cases involving extraordinary circumstances." (*Kollsman,* 737 F 2d at 844; App. A, p A-30)

Many decisions are best entrusted to the discretion of the trial judge. This is one of them. The time to review it for abuse is before trial, not after seven years of Federal litigation.

THIS COURT HAS UNIFORMLY HELD THAT ABSTENTION IS THE EXCEPTION TO THE DUTY OF DISTRICT COURTS TO ADJUDICATE CASES INVOLVING SUBSTANTIAL FEDERAL QUESTIONS. THE NINTH CIRCUIT IS ATTEMPTING TO ESTABLISH THE OPPOSITE

Where Federal questions are central to a lawsuit, the plaintiff has a right to have his case tried in the Federal courts. (*Wilcox v. Consolidated Gas Co.* [1908] 212 US 19, 40; *Bell v. Hood* [1946] 327 US 678, 681)

The duty of the District Courts to try such cases has been termed ". . . virtually unflagging . . ." *(Colorado River,* 424 US at 817). See also *Zwickler v. Koota* (1967) 389 US 241.

> "[A]bstention from the exercise of federal jurisdiction is the exception, not the rule. [Citation.]

(Hawaii Housing Auth. v. Midkiff [1984] _____ US _____, 81 L Ed 2d 186, 194; quoting with approval.)

The central issues in this case are Federal. They are Constitutional. They deal with the basic civil rights of people who own property. (See *San Diego Gas,* 450 US at 647-653 [Brennan, J., dissenting]; *Lynch v. Household Fin. Corp.* [1972] 405 US 538-552.)

In the last eight years, the Ninth Circuit has issued more published opinions in land use/abstention cases than all other Circuits combined. Its rule seems to be abstention. (See *Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830; *C-Y Dev. Co. v. City of Redlands* [9th Cir 1983] 703 F 2d 375; *Isthmus Landowners Assn. v. State* [9th Cir 1979] 601 F 2d 1087; *Santa Fe Land Imp. Co. v. City of Chula Vista* [9th Cir 1979] 596 F 2d 838; *Sederquist v. City of Tiburon* [9th Cir 1978] 590 F 2d 278; *Newport Inv., Inc. v. City of Laguna Beach* [9th Cir 1977] 564 F 2d 893; *Rancho Palos Verdes Co. v. City of Laguna Beach* [9th Cir 1976] 547 F 2d 1092.)

In *C-Y Development,* the Ninth Circuit made its land use rule quite express. That case was based on 42 USC §1983. Acknowledging that this Court has said abstention ought not apply in §1983 cases, the Ninth Circuit nonetheless abstained because none of this Court's §1983 cases had involved land use. (See 703 F.2d at 381.)

This routine application led Judge Reinhardt (in dissent) to conclude that the Ninth Circuit is attempting to make abstention ". . . the absolute rule in zoning cases rather than the exception in all cases . . ." (*Kollsman,* 737 F 2d at 844; App. A, p A-30)

The Ninth Circuit's rule is an affront to this Court. It flies in the face of all of this Court's abstention decisions. Review is deserved.

LAND USE CASES ARE NOT SO SENSITIVE THAT ABSTENTION MUST ALWAYS BE REQUIRED

In *Railroad Comm'n v. Pullman Co.* (1941) 312 US 496, 498, this Court held that Federal courts ought not delve into ". . . a sensitive area of social policy . . ." by Constitutional adjudication if state court interpretation of state law could obviate the need.

That general statement, however, was not intended to severely restrict Federal jurisdiction. As noted above, abstention was to be a limited exception, not the rule.

On the subject of a state's eminent domain power (involved at bench because this is an action for inverse condemnation [see *U.S. v. Clarke* (1980) 445 US 253, 257]), this Court concluded a quarter of a century ago that the field was not so sensitive as to routinely require abstention:

> "*It is suggested, however, that abstention is justified* on grounds of avoiding the hazard of friction in federal-state relations *any time a District Court is called on to adjudicate a case involving the State's power of eminent domain,* even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. *But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty.* Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, [citation], its power to regulate intrastate trucking rates, [citation], a city's power to issue certain bonds without a referendum, [citation],

> its power to license motor vehicles, [citation], and a host of other governmental activities carried on by the states and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law.
>
> "Furthermore, the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations." *County of Allegheny v. Frank Mashuda Co.* [1959] 360 US 185, 191-192; emphasis added.)

In stark contrast to this clear directive from this Court, the Ninth Circuit Court of Appeals completed nearly a decade of revisionist lawmaking by noting in this case.

> "We have repeatedly noted that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention. [Citations.]" (*Kollsman,* 737 F 2d at 833; App. A, p A-7)

No other Circuit employs such a knee-jerk holding of "local sensitivity." In fact, the other Circuits treat land use cases the same as any other, refusing reflex deferrence. (See, e.g., *Urbanizadora Versalles, Inc. v. Rivera Rios* [1st Cir 1983] 701 F 2d 993, 998; *Heritage Farms, Inc. v. Solebury Tp.* [3d Cir 1982] 671 F 2d 743, 746-747; *City of Moore v. Atchison, Topeka, & Santa Fe Ry.* [10th Cir 1983] 699 F 2d 507, 510; *Nasser v. City of Homewood* [11th Cir 1982] 671 F 2d 432, 439; *Silverman v. Barry* [DC Cir 1984] 727 F 2d 1121, 1123-1124.)

In terms of local sensitivity, there can never have been a land use case of more local sensitivity than *Hawaii Housing Auth. v. Midkiff* (1984) __ US __, 81 L Ed 2d 186, which dealt with the constitutionality of a Hawaiian statute designed to redistribute land ownership throughout the state. If ever a land use case cried out for deference to local wishes, that was it. Yet, when the State suggested abstention, this Court refused. Because the state law was clear (even though unconstrued by state courts) and no interpretation would remove the Federal issues, abstention was denied.

The same is true here. The state law is clear. Regardless of its determination, the Federal Constitutional issues will remain.[7] Under *Midkiff*, abstention would not have been warranted *before* trial. It is certainly improper after trial.

The Ninth Circuit is out of step with this Court and the other Circuits. Review is needed so American citizens who live in the Ninth Circuit receive the same treatment accorded those living elsewhere.

TO ESTABLISH SUFFICIENT UNCERTAINTY OF STATE LAW TO REQUIRE ABSTENTION, MORE IS REQUIRED THAN TO NOTE THAT COUNSEL FOR ONE OF THE PARTIES SAYS HE DISAGREES WITH THE DISTRICT COURT

The majority below concluded that state law was uncertain. How? By noting that the City's attorney disagreed with the District Court's interpretation. (*Kolls-*

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[7]I.e., even if a state court decides the Kollsman development was *not* deemed approved, the Federal question of whether the City's severe restriction of the property's use — conceded by the City's own appraiser to render the property not economically useable — will remain.

man, 737 F 2d at 834-836; App. A, pp A-8-12) However, as Judge Reinhardt cogently said in dissent:

> "It is not enough simply to say, as the majority does: the district court says X and the City says Y; therefore, there is a dispute as to state law; accordingly, the law is unclear and we must abstain. In order to conclude that abstention is appropriate, a court must at least identify which issues are critical to the outcome of the litigation and which involve questions to which the answer is, in *its* opinion, *actually* unclear. The majority does neither here." (*Kollsman,* 737 F 2d at 839; App. A, p A-18; Reinhardt, J., dissenting; emphasis, Judge Reinhardt's.)

Judge Reinhardt's dissent is in harmony with this Court's teaching, as well as with common sense. The majority follows neither. As this Court said in *Midkiff:*

> "The dissenting judge in the Court of Appeals suggested that, perhaps, the state courts could make resolution of the federal constitutional questions unnecessary by their construction of the Act. See 702 F 2d, at 811-812. *In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary.* Rather, '[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' *Zwickler v. Koota,* 389 US 241, 251, and n 14, 19 L Ed 2d 444, 88 S Ct 391 (1967), These statutes are not of an uncertain nature and have no reasonable limiting construction. Therefore, Pullman-abstention is unneces-

> sary." (___ US ___, 81 L Ed 2d at 195; emphasis added.)

To the same effect are *Ohio Bureau of Employment Serv. v. Hodory* (1977) 431 US 471, 481 and *Mayor v. Educational Equality League* (1974) 415 US 605, 628.

Particularly where the effect of its ruling is to undo seven years of Federal litigation on the merits and order the parties to begin again in state court, it seems incumbent on a Court of Appeals to do more than note the non-startling fact that the lawyer for the losing party in the District Court says he disagrees with the District Court's legal analysis.

This Ninth Circuit rule will make a shambles of the abstention doctrine. It ought not be permitted to harden into precedent.

IT HAS LONG BEEN SETTLED THAT A DECISION SHOULD BE BASED ON A PENDENT STATE LAW CLAIM RATHER THAN A FEDERAL CONSTITUTIONAL CLAIM

Every first year law student learns of this Court's preference for reaching decisions on non-Constitutional grounds if that is possible. The point was recently reiterated in *Pennhurst State School & Hosp. v. Halderman* (1984) ___ US ___, 79 L Ed 2d 67, 89-90:

> "This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. [Citations.] The Court also has held that *a federal court may resolve a case solely on the basis of a pendent state-law claim, [citation] and that in fact the court usually should do so in order to avoid federal constitutional questions,*

> [citation]; Ashwander v. TVA, 297 US 288, 347, 80 L Ed 688, 56 S Ct 466 (1936) (Brandeis, J., concurring) ([I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter')." (Emphasis added.)

The District Court did what this Court has repeatedly said it must do. It based the principal thrust of its decision on a state statutory ground. (Jurisdiction over the Federal Constitutional issues was reserved.)

What the District Court got for its pains (after seven years of litigation) was an inexplicable order from the Court of Appeals vacating its decision and commanding it to submit an issue to another court.[8]

The Ninth Circuit's decision flies in the face of settled law. But for this Court's clear preference for avoiding Constitutional issues, the case could have been decided on the primary issues tried. (Indeed, it still could be if the case were remanded for that purpose.) It is unseemly for the

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[8]The ostensible reason was to obtain a definitive interpretation of state law from state courts. However, as ably pointed out in *Lodestar Co. v. County of Mono* (E.D.Cal.1984) _____ F. Supp. _____, _____, fn. 23, the chances of getting such a determination are slight. Most California Court of Appeal decisions are not published and not precedential. Few cases reach the Supreme Court. Thus, after years of delay, there may in fact be no definitive determination of state law. See, e.g., the plight of Mr. and Mrs. Sederquist. They began Federal litigation in 1975. The District Court abstained and the Ninth Circuit affirmed. (*Sederquist v. Tiburon* [9th Cir. 1978] 590 F.2d 278) Their state court litigation resulted in an unpublished opinion and their Federal litigation continues to this day. (See *Sederquist v. Tiburon* [9th Cir. 1984] _____ F2d _____.)

Ninth Circuit to criticize the District Court for doing what this Court has commanded.

THE FEDERAL CONSTITUTIONAL RIGHTS OF THE KOLLSMAN HEIRS OUGHT NOT BE SACRIFICED ON THE ALTAR OF ABSTENTION

What sets this nation apart from the rest of the world is not merely the recitation in the Constitution that the rights of individuals are important,[9] but their protection by the judiciary.

That protection of the rights of individuals has been both the glory and the duty of the Federal courts.

But if the Federal courts weaken in their role as the individual's bulwark against unconstitutional state and local actions, then the rights of individuals will be reduced to fading words on yellowing parchment. Rights which are not enforced are not rights at all.

If the general rule in land use cases is to abstain, as Judge Reinhardt's dissent sadly puts it, then the Federal Constitutional rights of California property owners are rendered meaningless.

California courts do not enforce the Federal Constitutional rights of property owners. (Compare *Agins v. City of Tiburon* [1979] 24 C 3d 266 [aff'd on other grounds 447 US 255], with *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621, 647, 651, 655, fn 22, 660-661 [Brennan, J., dissenting procedurally, but apparently expressing the view of at least five Justices on the merits].) Even when the gravamen of the complaint is violation of the Federal Civil Rights Act (42 USC §1983), the California courts ignore Federal law and apply non-remedial California law. (See *Gilliland v.*

[9]Many constitutions do that, including the Soviet Union's.

County of Los Angeles [1981] 126 CA 3d 610, 617.) On the efficacy of the California "remedy," see Justice Brennan's dissent in *San Diego Gas & Elec. Co.*, 450 US at 653-656.

Such a result is bad enough when suit is initiated in state court. But when a plaintiff chooses the Federal forum to try his Federal Constitutional case (as he has a right to do [*Bell v. Hood* (1946) 327 US 678, 681]), and then after seven years of litigation is told that he must begin anew in the state courts, one sputters to find an appropriately descriptive term.

Delay — by itself — violates the Constitutional rights of Mr. Kollsman's heirs. (See *San Diego Gas & Elec. Co.*, 450 US at 656-657.)

The chilling effect on California property owners of knowing that they must subject themselves to the inhospitable atmosphere of the California court system (accompanied by the scandalous delays in getting cases concluded in metropolitan courts),[10] forfeits Federal Constitutional rights.

That cannot be justice.

CONCLUSION

If the abstention doctrine is to function fairly, the decision below cannot be permitted to stand. It is the final nail in a casket the Ninth Circuit Court of Appeals has been constructing for nearly a decade.

The Ninth Circuit's abstention doctrine thumbs its nose at this Court. It removes District Court discretion. It finds extreme local sensitivity in all land use cases while not finding it in public school (*Canton v. Spokane School*

[10]It takes five years for a civil case in Los Angeles Superior Court to proceed from complaint filing to trial.

Dist. #81 [9th Cir 1974] 498 F 2d 840), motor vehicle (*Pue v. Sillas* [9th Cir 1980] 632 F 2d 74), and prison condition (*Toussaint v. Yockey* [9th Cir 1984] 722 F 2d 1490) cases. It finds automatic uncertainty in local law because the lawyer for the losing party says he disagrees with the District Court's legal analysis.

It is time for this Court to call a halt.

For the Ninth Circuit to be permitted to establish its own body of law — at odds with the decisions of this Court and the other Circuits — in the hope that this Court will be too busy or uninterested in procedural decisions to intervene, contravenes elemental fairness.

The Petitioners pray that a writ issue to conform the law of the Ninth Circuit to that of the rest of the Nation.

Respectfully submitted,

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By: MICHAEL M. BERGER
Attorneys for Petitioners

APPENDIX

Eva KOLLSMAN, City National Bank, Tashi Land Corporation, a New York corporation, Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES, a municipal corporation, Defendant-Appellant.

No. 83-5798.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 4, 1984.

Decided July 17, 1984.

Michael M. Berger, Fadem, Berger, McIntire & Norton, Los Angeles, Cal., for plaintiffs-appellees.

William L. Waterhouse, Los Angeles, Cal., for defendant-appellant.

Joseph Barbieri, Deputy Atty. Gen., San Francisco, Cal., for amicus Cal. Coastal Comm. et al.

Appeal from the United States District Court for the Central District of California.

Before SNEED and REINHARDT, Circuit Judges, and SOLOMON*, District Judge.

SNEED, Circuit Judge:

Paul Kollsman sought approval from the City of Los Angeles to develop an eighty-five acre subdivision. The City denied the application on the ground that Kollsman had failed to submit requested information. Kollsman filed an action in federal district court alleging that the City's land use regulations violate the Fifth and Fourteenth

*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX A

Amendments and provisions of state law. Without addressing the federal consititutional claims, the district court held that Kollsman's subdivision application must be deemed approved under California law. We conclude that the district court, 565 F.Supp. 1081, should have abstained and allowed state courts to decide the questions of land use planning. We therefore vacate the judgment of the district court and remand.

I.

FACTS AND PROCEEDINGS BELOW

Paul Kollsman proposed to develop a seventy lot subdivision on an eighty-five acre tract of land located in the Santa Monica Mountains. On January 12, 1977, Kollsman submitted to the City of Los Angeles a proposed tract map and an "environmental Assessment Form." The City notified Kollsman on February 16, 1977, that it would not accept his subdivision application before he submitted a draft Enivronmental Impact Report (EIR). Kollsman submitted a first draft EIR on July 28, 1977.

By a memorandum dated August 16, 1977, the City informed Kollsman that two additional sections should be added to the EIR. Kollsman submitted a second draft EIR on September 13, 1977. The City circulated this draft for comment among concerned homeowner groups. On November 30, 1977, the City sent Kollsman a memorandum requesting further environmental information. The City sought information on development alternatives that would conform to the City's "slope denisty formula" and utilize "cluster development" as opposed to individual units.[1] Four months later, on March 3, 1978, Kollsman

[1]The "slope density formula" is part of the "community plan" for the Bel Air-Beverly Crest District of Los Angeles, which includes Kollsman's land. The City prepares community plans as part of the general plan required by California statutes. *See* Cal.Gov.Code §

submitted certain information requested by the City. He did not, however, submit information on alternative development plans.

The City informed Kollsman in a letter dated May 11, 1978, that the draft EIR could not be completed until he submitted information on alternative development plans and the slope density formula. On advice of counsel, Kollsman did not provide the additional information. The City mailed Kollsman a form notice of "Determination of Incompleteness of Application" on November 22, 1978. Two months later, on January 12, 1979, the City informed Kollsman that a public hearing could not be held on his application without completion of the EIR. On November 14, 1979, the City sent Kollsman a "Notice of Intent to Disapprove without Prejudice" for the reason that he had not submitted requested information. The City denied Kollsman's subdivision application on November 26, 1979.[2]

Concurrent with the City's processing of the subdivision application, Kollsman contested the land use regulations in federal district court. Kollsman filed a six-

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65302. The community plan shows specific land uses and densities of development for the various communities of the City. The City Planning Commission adopted the Bel Air-Beverly Crest District plan on March 4, 1976; the Los Angeles City Council endorsed the plan on January 13, 1977.

The slope density formula determines the number of units allowed on land designated as "minimum density housing." Under the formula, the maximum number of dwelling units depends on the average natural slope of the land. The slope density formula indicates that no more than nine dwelling units may be permitted on Kollsman's 85 acres.

[2]The City notified Kollsman at this time that he could appeal the denial of his application to the City Planning Commission. On December 20, 1979, the district court approved a stipulation agreed to by Kollsman and the City suspending the administrative appeal.

count complaint on March 1, 1977. Counts I and III sought to invalidate the slope density formula on constitutional theories of inverse condemnation and equal protection. Court III requested $6.3 million in damages for inverse condemnation. Counts IV, V, and VI involved state law claims. The district court granted the City's motion to dismiss Count V on April 25, 1977, and granted summary judgment in favor of the City on Counts IV and VI on March 28, 1978. In March and April of 1979, a seven-day bench trial was held on the constitutional claims.

On March 21, 1980, Kollsman filed a motion to submit additional evidence that raised, for the first time, the argument that his subdivision application should be "deemed approved" pursuant to California statutes. The court held two additional days of trial in April 1981. On November 11, 1981, the court issued an opinion stating that it had found for the plaintiff on the issue of liability and directing plaintiff's counsel to submit proposed findings of fact and conclusions of law. Over the City's opposition, the court on February 22, 1982, granted Kollsman's motion to amend the complaint to conform to proof. The amendment added two counts: Count VII asserts that Kollsman's application must be "deemed approved" under California law, and Court VIII claims rights under 42 U.S.C. § 1983.

On February 2, 1983, the district court held that Kollsman's subdivision application must be "deemed approved" pursuant to California Government Code Sections 65950 and 65956(a).[3] This result is based on the

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[3]Cal.Gov.Code §65950 provides in pertinent part:

> Any public agency which is the lead agency for a development project shall approve or disapprove such project within one year from the date on which an

court's conclusion that Kollsman's application was complete in fact and must be "deemed complete" on November 22, 1978. The court asserted that this conclusion is valid even though the City sent Kollsman a notice on that date stating that his application was incomplete. The district court found that the City could not in good faith determine that the application was incomplete when Kollsman had submitted all information that the City could lawfully request under applicable California statutes. The application was complete, and we must read its letter of November 22, 1978 to say that. Because the City did not act on Kollsman's application within one year from November 22, 1978, the court concluded that the application must be deemed approved.

The City filed a timely notice of appeal.[4]

Count VII raises difficult state law issues of great importance to the people of California. As already indicated, abstention is the appropriate course here.

We, therefore, vacate and remand.

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application requesting approval of such project has been received and accepted as complete by such agency.

Cal. Gov.Code §65956(a) provides:

> In the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, such failure to act shall be deemed approval of the development project.

[4]Paul Kollsman died before the district court entered its judgment. We granted the motion of his widow, Eva Kollsman, and City National Bank for substitution as parties herein. Mrs. Kollsman and the bank are administrators of Paul Kollsman's estate. For convenience, we will refer to appellees as "Kollsman."

II.

DISCUSSION

The abstention doctrine based on *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) is a narrow exception to the district court's duty to decide cases properly before it. *Pullman* allows postponement of the exercise of federal jurisdiction when "a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law." *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)).

[1] We apply an abuse of discretion test in reviewing district court abstention decisions. *E.g., C-Y Development Co.*, 703 F.2d at 377. This standard of review, however, does not preclude invoking abstention in cases in which there exist compelling reasons to allow state courts to resolve issues of state law. *Cf. Richardson v. Koshiba*, 693 F.2d 911, 915-18 (9th Cir. 1982) (ordering *Pullman* abstention after raising issue *sua sponte*). We believe that this is such a case.[5]

We have relied on three criteria for the application of *Pullman* abstention: (1) the complaint must touch a

[5]Our earlier refusal to grant a writ of mandamus requiring the district court to abstain, No. 78-1557 (9th Cir. June 7, 1978), does not preclude us from now holding that the district court should have abstained. First, we apply a more stringent standard of review under our mandamus jurisdiction than when reviewing on direct appeal a district court's order under the abuse of discretion standard. *Badham v. U.S. Dist. Ct. for N.D. Cal.*, 721 F.2d 1170, 1171 (9th Cir. 1983). Second, our order denying the petition for mandamus was issued before Kollsman raised the argument that his application should be deemed approved under California law. Thus, our earlier order did not consider the state law issues now involved in the case.

sensitive area of social policy into which the federal courts should not enter unless there is no alternative to adjudication; (2) a definitive ruling on the state issues by a state court could obviate the need for constitutional adjudication by the federal court; and (3) the proper resolution of the potentially determinative state law issue is uncertain. *Richardson,* 693 F.2d at 915; *see C-Y Development Co.,* 703 F.2d at 377; *Canton v. Spokane School Dist. No. 81,* 498 F.2d 840, 845 (1974).

[2] The first and second criteria are clearly satisfied in this case. We have repeatedly noted that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention. *E.g., C-Y Development Co.,* 703 F.2d at 377; *Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838, 840 (9th Cir. 1979); *Ranchos Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1094 99th Cir. 1976). The second requirement is also met. The conclusion eventually reached by the district court illustrates that a ruling on Kollsman's state law claims could obviate the need to address the federal constitutional claims.

We also find that the third requirement for *Pullman* abstention is met here. The district court's decision rests on an interpretation of interlocking statutory provisions enacted during the course of this litigation. The district court acknowledged that there have been few state cases that interpret the particular California code sections underlying its decision. Slip Op. at 21. Moreover, appellants persuasively argue that resolution of this case requires attention not only to Chapter 4.5 of the California Government code, the focus of this district court's opinion, but also consideration of the interrelation of that chapter with the Subdivision Map Act and the California Environmental Quality Act.[6]

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[6]The California Environmental Quality Act, Cal.Pub.Res.Code

The uncertainty of state law issues is illustrated by comparing the reasoning of the district court with the City's arguments before this court. For example, the district court relied on section 65941 of the California Government Code to conclude that the City could not in good faith refuse to accept Kollsman's application as complete.[7]. That section, the court held, prohibits the City from requiring Kollsman to submit the "informational equivalent" of an EIR. Because the district court found that Kollsman had submitted sufficient information to allow the City to prepare a legally adequate EIR, the court held that the City must consider Kollsman's application complete even though the City insisted that it was not. The City rejects this interpretation and argues that the request

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§21000 *et seq.*, requires preparation of an EIR whenever a project may have a significant adverse impact on the environment. *No Oil, Inc. v. City of Los Angeles,* 13 Cal.3d 68, 118 Cal.Rptr. 34, 529 P.2d 66 (1974).

The California Subdivision Map Act prohibits the City from approving projects that do not comply with the general and specific area plans. Cal.Gov.Code § §66473.1, 66474.61; *Woodland Hills Residents Ass'n, Inc. v. City Council of the City of Los Angeles,* 44 Cal.App.3d 825, 118 Cal.Rptr. 856 (1975).

[7]Cal.Gov.Code §65941 provides:

> The information compiled pursuant to section 65940 shall also indicate the criteria which such agency will apply in order to determine the completeness of any application submitted to it for a development project.
>
> In the event that a public agency is a lead agency for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code, such criteria shall not require the applicant to submit the informational equivalent of an environmental impact report as part of a complete application; provided, however, that such criteria may require sufficient information to permit the agency to make the determination required by Section 21080.1 of the Public Resources Code.

for information was authorizied by the City's administrative guidelines for evaluating a development project's consistency with the general plan.[8]. Moreover, the City maintains that section 65941 was not applicable to local agencies at the time it determined the application was incomplete.[9]

The district court and the City also differ on the completeness of Kollsman's application. The district court noted that section 65943 of the California Government Code requires that "[i]n the event that the application is determined not to be complete, the agency's determinations shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete." The district court found that the City's letter of November 22, 1978, did not satisfy this requirement and concluded that the City's determination of incompleteness was both incorrect and ineffective. It

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[8]The City Office of Planning and Research adopted "Permit Guidelines" to carry out Chapter 4.5 of the Government Code. Permit Guidelines §1087.1, effective January 31, 1978, provides:

> Local agencies should adopt as one of their criteria for completeness the requirement that the development project be shown in the application to be consistent with the applicable general plan required by Government Code sections 65300 *eet seq.*

The City argues that this provision authorized it to demand that Kollsman submit information on development alternatives consistent with the slope density formula.

[9]Section 65940, referred to in the first paragraph of §65941, did not apply to local agencies until June 30, 1983. Before it was amended in 1982, *see* 1982 Cal.Sate Ch. 84, §1, the first paragraph referred only to state agencies.

Kollsman responds by noting that the language in the second paragraph of §65941 refers to "a public agency" and that the City comes under the statutory definition of "public agency." *See* Cal.Gov.Code §65932.

therefore concluded that the City had failed to satisfy the time limits of section 65924.[10]. The district court held that the legislature intended that if the substantive requirements of section 65943 are not satisfied within the specified time limits, a development application should be deemed complete.[11] Therefore, Kollsman's application must be deemed accepted as complete on Novemer 22, 1978.[12]

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[10]Cal.Gov.Code §65924 provides:

> With respect to any development project an application for which has been accepted as complete prior to January 1, 1978; the deadlines specified in Section 65950 and 65952 shall be measured from January 1, 1978. With respect to such application received prior to January 1, 1978, but not determined to be complete as of that date, a determination that the application is complete or incomplete shall be made not later than 60 days after the effective date of the act amending this section in 1978.

The amendment adding the last sentence to §65924 became effective on September 26, 1978. Thus, the City had until November 26, 1978, to determine whether Kollsman's application was complete.

[11]Section 65943 provides in pertinent part:

> Not later than 30 calendar days after any public agency has received an application for a development project, such agency shall determine in writing whether such application is complete and shall immediately transmit such determination to the applicant for the development project.

As originally enacted, §65943 did not specify the consequences of a public agency's failure to make the determination within the specified time limit. Moreover, §65924 provides a separate time period for the determination of completeness on applications, such as Kollsman's that were submitted before January 1, 1978. *See supra* note 10. In 1979, §65943 was amended to provide that "if such written determination is not made within 30 days after receipt of the application, the application shall be deemed complete for purposes of this chapter." This amendment became effective on October 2, 1979.

[12]The district court's rationale for concluding that the application must be deemed complete on November 22, 1978, is somewhat opaque. The district court stated that as early as May 12, 1978, the

The city disputes each link in the district court's reasoning. The City argues that the district court erred by applying section 65943, as amended, retroactively to Kollsman's application,[13] and even if the section applies retroactively, an application should not be deemed complete even when an agency makes a timely, but erroneous determination that an application is incomplete. The City insists that the earliest possible date that

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City had all of the information that it could lawfully require Kollsman to supply. At 1095. The City, the district court found, suspended processing of the application and did not make a bona fide determination of completeness or incompleteness at any time prior to November 22, 1978. *Id.* After observing that the legislature intended that applications should be deemed complete "in the event of failure to meet the substantive requirements prescribed in §65943 within the time limits," and that Kollsman's application was in fact complete, the district court concluded that the application must be deemed complete as of November 22, 1978. At 1095.

Kollsman argues that a letter from the City dated November 14, 1979 may be read as a concession that the application was complete on November 22, 1978. The letter notified Kollsman that the City intended to disapprove the application on November 21, 1979, in order to meet the one-year deadline. The district court observed that "the notice of November 14, 1979, reflects an awareness that the Kollsman application was complete in fact on November 22, 1978." At 1096. Nonetheless, the district court did not specifically rely on this observation in concluding that the application must be deemed complete on November 22, 1978. Instead, the court made its comments concerning the November 14, 1979, letter when it considered whether the application should be deemed approved. *See* at 1096.

[13]The legislature specifically addressed the problem of pending application when it amended §65924. *See supra* note 10. When the legislature amended §65943, however, it did not distinguish between pending and subsequent applications.

The City argues that before the effective date of the "deemed complete" provision of §65943, an applicant's remedy for failure to comply with the time limits was to seek a writ of mandamus directing the agency to make the completeness determination.

Kollsman's application could be deemed complete is November 26, 1978.[14] If the application is deemed complete on this date, the City's rejection of the application on November 26, 1979 satisfies the one-year time limit provided by section 65950.[15]

Even if we assume that the district court correctly held that Kollsman's application must be deemed complete on November 22, 1978, uncertainty still obscures the legal consequences of that holding. The district court concluded that because the City had not satisfied the one-year deadline to approve or disapprove a completed application, the application must be deemed approved. At 1096. Various California state agencies, participating as *amicus curiae,* argue that Kollsman's application may not be deemed approved because he failed to submit a project proposal that complies with the California Environmental Quality Act and the Subdivision Map Act.[16] The City

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[14]The City was not required to make a determination of the completeness of Kollsman's application before November 26, 1978. *See supra* note 10. The City argues that if the district court correctly held that the determination of incompleteness on November 22, 1978, was ineffective, the proper conclusion is that this determination must be disregarded. Thus, if §65943 applies retroactively, the City reasons that the earliest date that the application could be deemed complete is November 26, 1978.

[15]*See supra* note 3. If the one-year period commenced on November 26, 1978, the City's disapproval of the project on November 26, 1979 was timely. November 25, 1979 was a Sunday, which extended the City's time to act until the next working day. *See* Cal.Civ.Code §§7, 10. The City also maintains that its requests for additional information should be interpreted as implicit denials of Kollsman's application. *Cf.Carmel Valley View, Ltd. v. Maggini,* 91 Cal.App.3d 318, 323, 155 Cal.Rptr. 208, 211-12 (1979) (request for supplemental information considered implicit disapproval for purposes of "deemed approved" provision of Subdivision Map Act). Kollsman attempts to distinguish *Maggini* by arguing that here the district court found that the City acted in bad faith.

[16]*See supra* note 6. Kollsman counters by arguing that the later enactment of Chapter 4.5 of the California Governmnet Code takes precedence over the earlier legislation.

argues that if Kollsman's application is deemed approved, such approval must be subject to appeal to the City Planning Commission and the City Council.[17] Alternatively, the City maintains that Kollsman's subdivision may only be deemed approved subject to the slope density formula.

These state law issues require us to conclude that the district court abused its discretion by failing to abstain. This case implicates the concerns underlying the first and third criteria for *Pullman* abstention.[18] Land use planning

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[17]The City relies on *Woodland Hills Residents Ass'n, Inc. v. City Council,* 44 Cal.App.3d 825, 118 Cal.Rptr. 856 (1975), which construed a then effective "deemed approved" provision of the Subdivision Map Act. Appellants challenged an advisory agency's approval of a subdivision. The trial court concluded that this action was deemed approved by the Planning Commission and the City Council because each body had voted by a tie vote to deny appeal from the advisory agency's decision. The Court of Appeals reversed, and held that the City Council had to determine if the project was consistent with the City's general plan. *See id.* at 830-31, 837-38, 118 Cal.Rptr. at 858-59, 863-69.

[18]The Supreme Court's recent decision in *Pennhurst State School & Hospital v. Halderman,* ___ U.S. ___, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), indicates that abstention often will be appropriate when state land use regulations are challenged on state and federal grounds. *Pennhurst* held that the Eleventh Amendment bars federal courts from ordering state officials to conform their conduct to state law. The court acknowledged that under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Eleventh Amendment poses no barrier to prospective relief against state officials for violation of federal law. Justice Powell, writing for the Court in *Pennhurst*, noted:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the surpeme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of

is a sensitive area of social policy. At issue here is the application of Chapter 4.5 of the California Government Code, which has as its purpose the establishment of clear requirements for the approval of development projects and the expediting of decisions on such projects. Cal.Gov. Code section 65921. Chapter 4.5, however, must be reconciled with earlier legislation, such as the California Environmental Quality act, which requires a balancing of the policies underlying Chapter 4.5 with the concerns reflected in the earlier enactments. This task is best left to the state courts. *Cf. Rancho Palos Verdes Corp.*, 547 F.2d at 1095 (abstention appropriate in case involving recently enacted "web of statutes" that attempts to "grapple with difficult land use problems"). We conclude, therefore, that abstention is requires in this case.[19]

> federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

104 S.Ct. at 911.

In a suit in which relief would run against the state, *Pennhurst* indicates that plaintiffs must go to state court to obtain relief based on state law. This is true even in cases in which the state law claims are pendent to federal claims. *See id.* at 919-20. Our holding in this case does not depend on *Pennhurst;* we need not determine if Kollsman's suit is in fact a suit against the state. *Cf. id.* at 920 n. 34 (noting that suit nominally against local government officials is barred if relief effectively runs against state). We merely observe that state courts may be the sole forum for effective relief for state law claims in land use cases involving state and federal law. This fact provides a very persuasive grounds for abstention in such cases.

[19]Kollsman relies on *Shamrock Development Co. v. City of Concord,* 656 F.2d 1380 (9th Cir. 1981) and *Midkiff v. Tom,* 702 F.2d 788 (9th Cir. 1983) to support his argument that abstention is not required in this case. We believe that *Shamrock Development* and *Midkiff* are distinguishable. In the former case, we held that although abstention would have been appropriate, the district court had not abused its discretion by retaining the case. In *Shamrock Development,* a developer claimed that a city had violated state law

III.

Because the district court should have abstained, we vacate its judgment and remand. At the request of either party, the district court should retain jurisdiction of the federal constitutional issues pending proceedings in the state courts. *See, e.g., Migra v. Warren City School District Bd. of Ed.*, ____U.S. ____, 104 S. St. 892, 898 n. 7, 79 L.Ed.2d 56 (1984); *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); *Richardson,* 693 F.2d at 918.

VACATED and REMANDED.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent.

I believe that the majority errs in holding that the district court abused its discretion by not abstaining from deciding the merits. There are no uncertain state law questions that must be resolved here. Rather, the case turns principally on a factual issue with a painfully obvious answer. Moreover, I believe that the majority's dispostion of the case illustrates how procedural rules intended to aid the federal

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and the state and federal constitutions by conditioning approval of a subdivision on the developer's dedication of land for city street expansion. We believe that the case before us involves issues that are more complicated and more intrusive into a sensitive area of social concern than those involved in *Shamrock Development.* In *Midkiff,* the state law issues were not uncertain and their resolution would not obviate the need to address federal constitutional issues. *See* 702 F.2d at 789 n. 1.

Kollsman also argues that abstention will create unjust delay in the determination of his state law claims. This consequence, however, must be accepted when the demands of comity and federalism require abstention. *See C-Y Development Co.,* 703 F.2d at 381. Nor does the fact that Kollsman also raised claims under 42 U.S.C. § 1983 alter our conclusions that abstention is appropriate. *See id.*

judiciary in performing its duties can, if misapplied, serve to deprive parties of fair and adequate resolution of their dispute. By unnecessarily and improperly invoking the abstention doctrine, the majority does a disservice to both parties, and no favor to the federal courts. Rather than vacate the district court's decision on abstention grounds, we should reverse its state law decision on the merits and remand the case to the district court for resolution of Kollsman's constitutional claims.

In January 1977, Paul Kollsman submitted to the City of Los Angeles an application for the development of a seventy lot subdivision. While that application was pending, he filed an action in district court containing both state and federal claims.[1] After considering the arguments for abstaining, the district court ruled that abstention was not appropriate.[2] The district court went on to dispose of the action on state law grounds and never reached the federal claims.

The district court held, in what must have been a surprise to all concerned, that, under California law, Kollsman's application was accepted as complete on November 22, 1978 and was deemed to be approved as a result of the City's failure to act by November 22, 1979. Apparently finding it difficult to accept the district court's singular approach to the issue, the majority concluded that there are too many uncertain questions of state law involved and abstention is therefore warranted. I, on the other hand, think it clear that the district court wholly

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[1] Although the majority does not specify the precise basis of the district court's jurisdiction, the district court stated that it had both divesity and federal question jurisidiction. We have jurisdiction over the appeal of the district court's final decision under 28 U.S.C. §1291 (1982).

[2] In deciding not to abstain, the district court suggested that its decision turned on the conclusion that it was capable of interpreting the state law "with minimum interference in state processes."

ignored the plain requirements of the California Government Code as well as the uncontrovertible facts when it decided that the City had accepted Kollsman's application as complete. In my opinion, there are no unclear or uncertain questions of state law that require resolution in this case.

The district court, intentionally or otherwise, circumvented the provisions of California law by finding as a matter of fact that the City had acepted Kollsman's application as complete. Because its critical finding of fact is so clearly erroneous,the district court's decision cannot stand. It is obvious from the record before us that the City did the precise opposite of that which the district court says it did. The City *expressly* found that the application was incomplete, not complete. Moreover, even if, under California law, Kollsman's application could have been deemed complete, that event would not have occured until several days late on November 26, 1978. Even in that case, the City could not be deemed to have approved the application, for the City subsequently explicitly disapproved the application in a timely manner. Thus, contrary to the district court's assertion, it is absolutely clear that the City *never* approved the application, explicitly or by operation of law.

The majority unnecessarily raises many state law questions that it says have unclear answers. However, we need not resolve any of those state law issues in order to decide this case. We can and must view the issue of the appropriateness of abstention differently after the district court has decided the case on the merits than we would at the outset of the litigation. When an abstention motion is made early in the proceedings, the court will often not be in a position to know which issues will prove determinative or even which issues it will be necessary to consider. Much may depend on how the parties decide to develop facts that

are not yet before the court and how the court then resolves particular factual questions: whether or not a court must proceed down a particular road often will be determined by the decisions that are made at the preceding crossroad. However, after the trial is over and the facts and the law have both been fully explored, we can determine with certainty what, if any, state law questions *must* be decided and whether the answer to any such questions is unclear. The majority therefore errs in justifying abstention by raising many state law questions simply because at first blush they may appear to be of some relevance; in fact, a careful review of the fully developed record demonstrates that those questions are wholly irrelevant to the *proper* resolution of the dispute before us.

The majority errs in another basic respect in its approach to the abstention doctrine. It is not enough simply to say, as the majority does: the district court says X and the City says Y; therefore, there is a dispute as to state law; accordingly, the law is unclear and we must abstain. In order to conclude that abstention is appropriate, a court must at least identify which issues are critical to the outcome of the litigation and which involve questions to which the answer is, in *its* opinion, *actually* unclear. The majority does neither here.

THE INAPPLICABILITY OF THE ABSTENTION DOCTRINE

The general rule concerning the exercise of federal jurisdiction was once simple:

> The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution .. . . with whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the

> exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821) (Marshall, C.J.).

Over time, however, the Supreme Court has made limited inroads on that rule. One example is the abstention doctrine, originally created in *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). "[T]he Supreme Court has stated that the doctrine of abstention 'is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' " *Hillery v. Rushen,* 720 F.2d 1132, 1137 (9th Cir. 1983) (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)); *see, e.g., Colorado River Water Conversation District, v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976) *C-Y Development Co v. City of Redlands,* 703 F.2d 375, 377 (9th Cir. 1983).

Designed for reasons of federalism and for the purpose of making it possible to avoid the unnecessary resolution of constitutional questions, the abstention doctrine allows a district court to exercise its equitable powers in extraordinary instances to abstain from resolving state law issues. *See, e.g., Pue v. Sillar,* 632 F.2d 74, 78 (9th Cir. 1980) (citing *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964)). In reviewing a district court's decision whether "compelling reasons" justify application of the abstention doctrine, we apply an abuse of discretion standard. *See, e.g., Midkiff v. Tom,* 702 F.2d 788, 789 n. 1, 799 (9th Cir. 1983), *reversed on other grounds, sub nom. Hawaii Housing Authority v. Midkiff,* ___ U.S. ___, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). We have been extremely hesitant to find that a district

court abused its discretion in deciding state law questions. For example, in a case involving a municipal zoning decision, we refused to hold that the district court abused its discretion in deciding not to abstain; we did so even though it "was a case in which abstention would have been advisable, and well within the discretion of the court . . . . State law questions clearly predominated over federal questions. But we have no basis for holding that it was an abuse of discretion to retain the case." *Shamrock Development Co. v. City of Concord,* 656 F.2d 1380, 1385 99th Cir. 1981).[3]

As the majority correctly restates, we have relied on three criteria in evaluating the propriety of the application of the abstention doctrine. *See, e.g., Canton v. Spokane School District No. 81,* 498 F.2d 840, 845 (9th Cir. 1974). The first criterion is that the complaint must involve a "sensitive area of social policy" that is best left to the states to address.[4] The second criterion is that a ruling on the state law issue may render unnecessary the

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[3]The majority's decision is based entirely on its view that the district court should have abstained. Thus, to reach its result, the majority was required to apply an abuse of discretion standard. It is far from clear why the majority believes that the district court's decision was not only wrong but that it constituted an abuse of discretion. I, on the other hand, believe the district court was right not to abstain but that it based that decision on the wrong reasons. I first review the district court's substantive decisions regarding state law issues under the standard we normally use to review such decisions. Having concluded that the district was wholly incorrect regarding the merits of those state law issues, I believe it is then appropriate to review the abstention issue under a *de novo* standard. However, I would reach the result I do here regardless of the standard of review applicable to any of these questions.

[4]I agree with the district judge that the effect of any decision here as to the state law questions, whatever it might be, will for practical reasons be so limited that the first criterion is not met. *See infra* p. 843.

resolution of a constitutional question. The final factor, which I believe is dispositive here, is whether the proper resolution of the possibly determinative state law issue is *uncertain. See, e.g., Pue v. Sillas,* 632 F.2d at 78-81.

If the proper resolution of the state law question is *certain*, abstention if improper. Even if the particular issue has never been addressed by the state courts, the proper resolution of a state law question may be certain. *See., e.g. Harman v. Forssenius,* 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1188-89, 14 L.Ed.2d 50 (1965); *Meredith v. Winter Haven*, 320 U.S. 228, 232, 234-35, 64 S.Ct. 7, 10-11, 88 L.Ed. 9 (1943); *Hillery v. Rushen,* 720 F.2d 1132, 1137 (9th Cir. 1983); *Midkiff v. Tom,* 702 F.2d at 789-90 n. 1; *see also* Field, *Abstention in Consitutional Cases,* 122 P.Pa.L.Rev. 1071, 1092 (1974) (arguing in favor of "[l]imiting abstention to cases in which the state law issue is *extremely* unclear"; (emphasis added)). Thus, even though the district court said that "[t]here have been few cases which interpret the California code sections which are involved in this case," 565 F.Supp. 1081, 1090, that alone would not mandate abstention.

Although several interrelated provisions of California law are raised by one or the other of the parties, the facts of this case, and the express language of the provisions that determine its results, ar such that it is not necessary to resolve any unclear questions of state law. The one legal theory that the district court seems to be suggesting may readily be determined to be wholly without foundation. Then, when the simple critical factual question raised by the district court is isolated and given even the most cursory consideration, the outcome of the case becomes absolutely clear; whatever uncertain state law questions may otherwise be said to exist are no longer of any possible relevance. In short, the majority's entire list of "uncertain" state law questions consists of questions that

we need not, and should not, resolve in this case. Accordingly, the majority's invocation of the abstention doctrine is unnecessary and inappropriate.

THE DISTRICT COURT'S DECISION

It is clear that under California law the City was required to determine whether Kollsman's application was complete and notify him in writing of that determination by November 26, 1978; in addition, if the City determine that the application was not complete it was required to specify the deficient parts of the application in the written notification. There can be no dispute as to the state law on those points.[5]

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[5]As enacted in 1977, with an effective date of January 1, 1978, Cal.Gov't Code §65943 (Deerings 1979) stated that:

> Not later that 30 calendar days after any public agency has received an application for a development project, such agency shall determine in writing whether such application is complete and shall immediately transmit such determination to the applicant for the development project. In the event that the application is determined not to be complete, the agency's determination shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete.

However, Cal.Gov't Code §65924 (Deerings 1979) as enacted in 1977 and amended in 1978 established a different time limitation for applications, like Kollsman's, filed before, but not determined to be complete by, January 1, 1978. Section 65924, in relevant part, states that

> [w]ith respect to such application received prior to January 1, 1978, but not determined to be complete as of that date, a determination that he application is complete or incomplete shall be made not later than 60 days after the effective date of the act amending this section in 1978.

Because section 65924 became effective on September 26, 1978, the City had 60 days from September 26, 1978, or until November 26, 1978, to determine whether Kollsman's application was complete. Neither the district court nor any party diputes the applicability of this section to Kollsman's appeal.

The City informed Kollsman in a letter dated November 22, 1978, that his application had been "determined to be incomplete," and stated what information was missing from the application. The district court seemingly relied on two grounds in holding that by sending the letter the City accepted the application as complete on November 22, 1978. First, the district court concluded that the application in fact was complete under California law; it then apparently decided that, for that reason, the letter must be read as having the opposite effect of its stated purpose. Second, the district court apparently read a subsequent letter of November 14, 1979 as somehow reversing, with retroactive effect, the plain meaning of the letter of November 22, 1978. Neither of these arguments can withstand any level of scrutiny, and neither purports to rely on any principle of California law.

The district court's unarticulated legal theory that if an application is in fact complete, a determination that it is incomplete constitutes a determination that it is complete is highly ingenious but wholly unmeritorious. Moreover, even assuming that the application did in fact contain all the information required by California law[6] and that the City's request for further information was erroneous or made in bad faith, the City's one year period for approving a complete application still could not have commenced to run earlier than November 26, 1978, if at all.

Assuming the answer to every theoretically unclear state law issue to be favorable to Kollsman's position, the one year period for approval or disapproval would have

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[6]The letter indicated that, along with other information, an environmental impact report (EIR) was missing from the application. The parties disagree as to whether under California law Kollsman was required to file an EIR. Given the proper resolution of the case, *see infra* pp. 841-843, I find it wholly unnecessary to resolve the question of whether an EIR was required to be submitted with the application.

begun on November 26, 1978 because that was the date on which, under the California statute, the City was required to make its determination as to the completeness of Kollsman's application.[7] The only possible way the one year period could have commenced to run before November 26, 1978 would have been not only for the City's finding of incompleteness to be deemed a finding of completeness, but even more critical, for the City to have somehow obtained notice that such was the paradoxical effect of its request for further information. While it may be argued that under some circumstances a City may have notice than an application will be deemed complete if it fails to act on a date by which it is required to decide whether or not the application is complete, I am aware of

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[7]We may assume, for example that under California law Kollsman's application would have been deemed complete if the City had failed to act by November 26, 1978. We can also assume that Kollsman's application contained all the information required by applicable st.. ıtes. We can even assume that under California law a bad faith response is treated in the same manner as a failure to respond at all and that in this case the City's response was made in bad faith. I make these assumptions *arguendo* although in my opinion there is no statutory basis for deeming Kollsman's application to be complete under any circumstances. Cal.Gov't. Code §65943 (Deerings 1984) was amended in 1979 (and the amendment became effective on October 2, 1979) to add a new second sentence: "If such written determination is not made within 30 days after receipt of the application, the application shall be deemed complete for purposes of this chapter." Because his application was filed in January 1977, this new "deemed complete" provision to section 65943 did not apply to Kollsman's application. Section 65924 did, instead. But even if the amendment to section 65943 were applied retroactively and to applications subject to the separate time limitation of Cal.Gov't Code §65924 (Deerings 1979), *see supra* note 5,under the "60 days after the effective date" provision of the latter section the application could not have been deemed complete until November 26, 1978. Therefore, the City's disapproval on November 26, 1979, would have fallen within the one year limitations period of Cal.Gov't Code § §65950, 65956(b) (Deerings 1979). Accordingly, we need not address any of the "unclear" state law questions.

no theory under which the City of Los Angeles could be said to have afforded notice that its preliminary determination as to incompleteness and its request for further information would trigger the running of a one year statute that commences, according to its terms, only when the application is "accepted as complete."[8]

Thus, the district court's decision must rest on its second theory—its apparent resolution of a factual issue it perceived to be raised by the two letters sent by the City to Kollsman. The November 22, 1978 letter was, as we have noted, clear and unambiguous. It found Kollsman's application incomplete and requested further information. Almost one year later, in a form letter to Kollsman dated November 14, 1979, the City stated that under a recent statutory amendment it "is required to act on certain projects ... within one year of the date of acceptance of an application as complete" and that it planned to disapprove the application on November 21, 1979. The letter contained no specifics about Kollsman's application, except for the date that it was originally filed. It did not state that Kollman's application had ever been accepted as complete; nor did it state the date on which any such action might have occurred, nor the date on which the City was

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[8]Cal.Gov't Cod §65950 (Deerings 1979) states, in relevant part, that "any public agency which is the lead agency for a development project shall approve or disapprove such project within one year from the date on which an application requesting approval has been received and *accepted as complete by such agency.*" (emphasis added). Section 65950 was amended in 1983. The amendments become effective on January 1, 1990 and therefore do not bear upon Kollsman's application. Even making all the assumptions set forth in note 7, *supra* there is no way the City could have *known* that all the statutory construction issues, including the obviously insuperable bar of retroactivity, would be decided in an arbitrary and erroneous manner *and* that in addition its sending of its November 22, 1978 letter of incompleteness would be treated by the district court as constituting a determination of completeness.

required to approve or disapprove his application. In fact, the letter stated specifically that the application "has been held pending receipt of requested additional materials." Thus, on its face the November 14, 1979 letter in no way reverses, or even contradicts, the November 22, 1978 one; in fact, it is in some important respects consistent with the earlier letter.

The district court read the letter as "a stroke of conscience," 565 F.Supp. at 1096, and concluded that it demonstrated that the City had accepted the application as complete on November 22, 1978. This factual conclusion is wholly contrary to the evidence and to all rules of logic. It is inconceivable that the November 14, 1979 letter—a form letter that was devised to comply with a recent amendment to a statute and was in significant respects consistent with the November 22, 1978 letter—could serve to reverse completely the plain meaning of the earlier letter so that an express statement that the application was *incomplete* must be read retroactively as stating that the application was *complete*. The majority says that "[t]he district court's rationale for concluding that the application must be deemed complete on November 22, 1978, is somewhat opaque." Majority opinion p. 835 n. 12. I disagree. Rather then merely opaque, the district court's factual conclusion is, in my opinion, bizarre, as well as wholly and clearly erroneous.

There is, in fact, only one possible interpretation of the November 22, 1978 letter: Kollsman was notified on November 22, 1978 that the City had determined that his application was incomplete; the City's letter meant and continued to mean precisely what it said and not the opposite. That meaning could not be changed, retroactively or otherwise, by a subsequent letter. Moreover, there are various possible explanations for the City's action in sending the November 14, 1979 form letter. The

letter could have been sent to Kollsman (1) because the City was making one final attempt to obtain information it had been seeking for some time, (2) because the City had decided to disapprove *all* applications in which the parties failed to supply requested information, despite the fact that no formal disapproval was required with respect to applications previously found to be incomplete, (3) out of bureaucratic confusion over whether the recent amendment to the statute required new disapproval letters in cases of longstanding incomplete applications, or (4) simply out of an excess of caution. It is of no significance which explanation is correct, nor is it significant that the City could have sent an individualized letter that more clearly specified its purpose and that was more narrowly tailored to Kollsman's situation. What matters for the purposes of the case before us is that, as I have said, the 1979 letter could not under any theory serve to reverse, retroactively, the plain meaning of the 1978 letter. Of equal importance, even if a district court did have the discretion to give such effect to the 1979 letter, there is no means by which retroactive notice to the City could serve to afford it the one-year statutory period within which to approve or disapprove a completed application.

After an application is accepted as complete, the City is required to approve or disapprove it within one year. Cal.Gov't Code §65950 (Deerings 1979)[9] Failure to do so is deemed to constitute approval.[10] Even assuming that Kollsman's application could be deemed complete as a result of the City's finding it incomplete, as I have already explained, the earliest date on which it would have been

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[9] *See supra* note 8.

[10] Cal.Gov't Code §65956(a) (Deerings 1979) provides that "[i]n the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, such failure to act shall be deemed approval of the development project."

deemed complete would have been November 26, 1978. Thus, at worst, the City had until November 26, 1979 to approve or disapprove the application. It acted within that deadline when it sent a letter of disapproval on that date.

In sum, despite the majority's statements to the contrary, there are no uncertain state law questions that we need to resolve. Rather, to reach the proper result, we need only resolve a factual question with an obvious answer.

Abstention was improper for another reason as well. There is no "sensitive area of social policy" implicated here. Although zoning may generally involve sensitive areas of social policy, this narrow dispute does not.

The specific issues raised here are far from sensitive if for no other reason than that they will almost certainly never be raised again. As the district court recognized, there is "little likelihood that the future will bring State Court decisions on applications which were filed prior to January 1, 1978 and remain undetermined. In this respect, the Kollsman case may be unique. At least the possibility of additions to the species has long been extinct." 565 F.Supp. at 1090.

In short, the majority errs in stating that Kollsman's claim "raises difficult state law issues of great importance to the people of California." Majority Opinion slip op. p. 3053, p. 833. We need not decide any difficult or unclear questions of state law, but only a simple factual issue—the meaning of an unambiguous letter. Moreover, because most of the issues the parties discuss in the briefs probably will never be raised again, it is wrong to say that they are of great, or even any, importance to the people of California.

In conclusion, because two of the three requirements for abstention have not been satisfied, the majority errs in invoking the doctrine.

THE ADVERSE EFFECTS OF ABSTENTION

The majority's holding that the district court abused its discretion in not abstaining will unnecessarily delay resolution of Kollsman's claims for many years. Assuming that the plaintiffs have the necessary funds and stamina to pursue this litigation indefinitely, the state law issues will at some point be resolved in favor of the City, on one ground or another, and the federal courts will ultimately, if belatedly, be required to resolve the constitutional questions. In a decision holding that a district court properly decided the state law issues before it, the Supreme Court condemned the delay resulting from unnecessary application of the abstention doctrine. *Meredith v. Winter Haven,* 320 U.S. 228, 237, 64 S.Ct. 7, 12, 88, L.Ed. 9(1943); *see* C. Wright, *Law of Federal Courts* §52, at 305 (recognizing that *Pullman* abstention has "[i]n a number of well-known cases ... led to delays of many years before the case was finally decided on its merits or limped to an inconclusive end" (footnotes omitted)).

Here, the district court had jurisdiction over both the federal and state law claims; absent extraordinary circumstances, the plaintiff should not be deprived of the right to have his claims resolved in a federal forum. Furthermore, the delay that will be caused by unnecessary and improper abstention in this case is far longer than the two year delay that the Supreme Court criticized in *Winter Haven.*

In January 1977, Kollsman submitted the development proposal to the City. In March 1977, he filed this complaint. The district court decided the case in February 1983. We heard the appeal in January 1984. The majority's decision will effectively render moot the district court proceedings and send the state issues to the Cali-

fornia courts for a new beginning. This will, of course, delay for many years the final resolution of this dispute.

The suite has already outlived the original plaintiff, Paul Kollsman. The Kollsman estate will be most fortunate indeed if it is able to resolve even the simple and unimportant state law aspect of this litigation by 1987—ten years after the time the original application was filed. The case will then return to the federal courts for resolution of the federal issues unless by that time the plaintiffs have abandoned their rights in despair. In my opinion, we have a legal duty to exercise our jurisdiction now.

THE MERITS OF THE STATE LAW ISSUES

In order to discuss the abstention questions fully, it has been necessary to point out why I believe the district judge decided the merits of the state-law questions erroneously. I would, for the reasons I have already discussed, reach those merits and reverse the district court's decision.

CONCLUSION

Because there are no unclear questions of state law that require resolution, because a sensitive social policy is not implicated, and because the state law issues are in any event of little or no importance to the people of California, the majority errs in invoking the abstention doctrine. To dispose of this case, we need only resolve a simple factual question with an obvious answer. By attempting to make abstention the absolute rule in zoning cases rather than the exception in all cases, the majority does a disservice to the litigants, who deserve, at a minimum, a reasonably prompt resolution of the federal issues that are determinative of this lawsuit. We should allow the already long delayed dispute to proceed to an orderly resolution. The abstention doctrine and its accompanying delay should be reserved for cases involving extraordinary circumstances.

The district court's decision on the state law questions should be reversed on the merits and the case remanded so that Kollsman's constitutional claims may be resolved. I believe that the majority errs in vacating the district court's decision on the basis of the abstention doctrine. I therefore dissent.

FILED
SEP 05 198.
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

United States Court of Appeals for the Ninth Circuit

EVA KOLLSMAN; CITY NATIONAL BANK; TASHI LAND CORPORATION, a New York corporation, *Plaintiffs-Appellees,* *v.* CITY OF LOS ANGELES, a municipal corporation, *Defendants-Appellants.*	No. 83-5798 **ORDER**

Before: SNEED and REINHARDT, Circuit Judges, and SOLOMON*, District Judge.

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Paul KOLLSMAN: Tashi Land Corporation, a New York corporations, Plaintiffs,

v.

CITY OF LOS ANGELES, a municipal corporation, Defendant.

No. CV 77-0770-ALS.

United States District Court,
C.D. California
Feb. 1, 1983.

Jerrold A. Fadem, Michael Berger, Richard D. Norton of Fadem, Berger & Norton, Santa Monica, Cal., for plaintiffs.

Ira Reiner, City Atty., Gary R. Netzer, Asst. City Atty., William L. Waterhouse, Deputy City Atty., Los Angeles, Cal, for defendant.

JURISDICTION

MEMORANDUM DECISION

STEPHENS, District Judge.

JURISDICTION

This court has jurisdiction founded on diversity of citizenship and amount in controversy pursuant to Title 28, United States Code Section 1332.

Plaintiff is a citizen of the State of New York and defendant is a municipal corporation incorporated under the laws of the State of California having its principal place of business in the State of California. The matter in controversy exceed, exclusive of interest and costs, the sum of ten thousand dollars. The court also has jurisdiction founded upon Title 28, United States Code Section 1331, the existence of a federal question.

SCOPE OF THIS OPINION

This opinion is limited in its scope to Count VII, added with the permission of the court to conform to proof, without deciding the constitutional questions raised in other counts, a procedure which honors the principle that preferably controversies should be decided upon other than constitutional grounds. The courts has retained jurisdiction of the other counts.

The facts are largely undisputed. However, in some instances there are conflicts in the evidence which must be resolved. The facts as stated in this opinion represent a resolution of conflicting evidence as well as a recitation of the undisputed facts. Where there is a conflict in the evidence, the statement of the court in this opinion is intended as a finding of fact. To contribute to clarity, the opinion combines fact and law. The court intends that its statements of law be taken as the court's conclusions of law. *See* Fed.R.Civ.Pro 52(a)

PROCEDURAL HISTORY

On March 1, 1977, plaintiffs filed a six count complaint for inverse condemnation and a declaration that certain actions by the City were invalid. Counts I, II, and III raised claims under the Taking and Equal Protection Clauses of the United States Constitution. Counts IV, V, and VI raised claims under various provisions of California state zoning and environmental control laws.

On March 31, 1977, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants moved to dismiss Counts II, III, IV, V and VI. The motion was granted only as to Count V. Thereafter, on May 16, 1977, the City filed its answer to plaintiffs' complaint.

On September 8, 1977, the City filed a second motion to dismiss for lack of diversity of citizenship jurisdiction

and on the grounds that this court should abstain from exercising federal question jurisdiction. On November 22, 1977, the City's motion to dismiss was denied.

On February 10, 1978, the City filed a motion for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure, seeking a summary judgment as to plaintiffs' five remaining causes of action. Summary judgment was granted as to Count IV and Count VI, and denied as to Counts I, II, and III.

On March 15, 1978, the City filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The City argued before the Court of Appeals that plaintiffs' complaint was not ripe for adjudication and that the district court exceeded its jurisdiction and abused its discretion by declining to abstain from exercising jurisdiction over this case. On June 7, 1978, the Court of Appeals denied the petition for writ of mandamus stating in an order as follows:

> "We cannot concur, at this stage of the proceedings, that the complaint of the real parties in interest fails to present a justiciable controversy. Nor can we now find that the district court has abused its discretion in declining to abstain as the unsettled issues appear to include substantial federal constitutional questions."

On August 10, 1978, the Court of Appeals denied the City's petition for rehearing and suggestion for rehearing en banc.

On July 27, 1978, the City filed a motion to strike plaintiffs' demand for a jury trial and said motion was granted. The first phase of the trial was a six day court trial ending April 5, 1979. On November 26, 1979, plaintiffs' development application was disapproved by the City for

lack of completeness. Subsequently, the court viewed subject property and two more days of trial were conducted, ending April 22, 1981.

On February 17, 1982, at the suggestion of the court, Kollsman filed a motion for leave to amend his complaint to conform to the evidence pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. In a minute order dated February 22, 1982, the court granted the motion. Kollsman's amendment adds two causes of action. Count VIII was a civil rights claim under 42 U.S.C. § 1983 against the City. Kollsman argued that as a result of the United States Supreme Court's ruling in *Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), he was entitled to raise a claim under 42 U.S.C. Section 1983 against the City.[1] This count has not been litigated. Count VII was added to conform to proof. This cause of action involved the application of Cal. Government Code Sections 65920 *et seq.* (Review and Approval of Development Projects), which became effective while this case was pending. Since as expressed in this opinion, Kollsman is entitled to relief under the provisions of Cal. Government code Sections 65920 *et seq.,* it is unnecessary to address his claims under the United States Constitution and 42 U.S.C. Section 1983 at this time.

THE CITY'S SUBDIVISION PROCESS

A discussion of the facts requires reference to the City's subdivision approval procedure.[2] A prospective subdivider initiates the process for subdivision approval by submitting to the City Planning Department a "Tentative Tract

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[1] *Monell* held, contrary to existing law at the time, that municipal corporations are "persons" within the meaning of 42 U.S.C. § 1983, and thus subject to liability for civil rights violations.

[2] This narrative summarizes the provisions of the Los Angeles Municipal Code, Sections 17.00 through 17.49.

Map" which must describe the proposed development project. This Tentative Map is circulated among a number of City departments for comment. The departments respond through written reports which are submitted to the Planning Department to be consolidated and considered by a Deputy Advisory Agency, a member of the Planning Department staff with the statutory power to approve, conditionally approve, or disapprove the proposed subdivision. Prior to making its decision on the Tentative Map, the Deputy Advisory Agency notifies all property owners within 300 feet of the property proposed to be subdivided of a public hearing to consider the proposal.

Along with the reports from various City departments, the Deputy Advisory Agency also has the benefit of information developed through the City's environmental review process. This procedure is mandated by the California Environmental Quality Act of 1970 (hereafter "CEQA" Pub. Resources Code Section 21000 *et seq.)* and the State and City Guidelines promulgated under its authority. CEQA requires that the City undertake a preliminary analysis of all projects which may have an impact on the environment. In Los Angeles, this initial screening is accomplished by a Planning Department Environmental Review Committee. If the screening identifies any "significant" effects on the environment which may arise from the project, then the Planning Department may require the developer to submit material for preparation of a draft Environmental Impact Report (EIR). This draft EIR, once complete, is then used by the Planning Department to develop a full-scale analysis of all potential environmental impacts. This analysis is circulated to interested government agencies, the State Clearinghouse in Sacramento, and the public for its review and comment. Once all comments are received, the analysis emerges in the Final EIR. This final EIR must be certified as

complete and then used by the Deputy Advisory Agency is making his final decision. Pub. Resources Code § 21151.

If the information submitted by the developer for preparation of a draft EIR is inadequate, subsequent submissions are required until enough information is provided for the City to describe the project, its impacts, and alternatives in sufficient detail to solicit public comments.

If the Deputy Advisory Agency disapproves the proposed subdivision, the developer may appeal to the City Planning Commission and, if necessary thereafter, to the City Council L.A.M.C. § 17.06. If the Deputy Advisory Agency approves the subdivision, any "interested person adversely affected by the proposed subdivision" may appeal to the Commission and then to the Council. *Id.* Ordinarily, approved subdivisions are subject to a number of conditions which must be satisfied before construction begins, such as dedication of property for streets, installation of necessary utilities, etc. Once the conditions for approval have been satisfied, the subdivider may submit to the City his Final Tract Map. L.A.M.C. § 17.07. When this Final Map is accepted and recorded, the subdivider may commence construction and sell lots.

Elements of the City's General Plan — like the Beverly Crest-Bel Air District Plan — play an important role in the subdivision process. Under state law, a subdivision cannot be approved unless the Advisory Agency makes a finding that the development is "consistent with applicable general or specific plans." Cal.Gov.Code § 66474.60. This Advisory Agency finding is based on all available information, including the final EIR and reports from City Departments, and cannot be made until that information base is complete.

FACTS

In 1946 Kollsman purchased a Mediterranean-style home in the Santa Monica mountains above Beverly Hills. The home was situated on 12 acres of land. Thereafter, Kollsman began acquiring other undeveloped property surrrounding his home intending to subdivide it as he neared his retirement. The most recent acquisiton was made in 1964, when Kollsman purchased a house and two neighboring lots on Benedict Canyon Drive.

In 1946 the zoning for subject property was R-1, with a minimum lot size of 5,000 square feet. In 1960 R-1-4 zoning was established which changed the minimum lot size to 15,000 square feet. In 1971 an amendment to the zoning plan was passed which allowed a maximum density on subject property of 60% of the maximum dwelling unit density shown on the existing plan.

On January 12, 1977, as a result of Kollsman's efforts and those of his engineers and geologists, Kollsman submitted to the City's Planning Department an Environmental Assessment Form and Tentative Tract Map 33300, which showed his proposed residential subdivision. One day later, on January 13, 1977, the City Council adopted the Beverly Crest-Bel Air District Plan. The District Plan limits development of private property in two ways. First, the property is given a minimum density designation which means the maximum density permitted is 0.5 to 1 dwelling per acre. Second, dwelling unit density is limited by the slope-density formula. According to the formula, the allowable density for residential development is as follows:

$$\frac{D=50-S;}{35}$$

D= maximum number of dwelling units per gross acre allowable.

S= average slope of the land in percent.

Pursuant to this formula, the City claims plaintiffs would be permitted to divide the 85 acres of subject property into a maximum of nine (9) building lots instead of the seventy (70) he originally proposed and the maximum eight-five (85) lots permitted under the District Plan without the slope-density formula.

In a document dated February 2, 1977, the City's Planning Department informed Kollsman that a focused environmental impact report should be prepared by Kollsman, including a discussion of "slope analysis" and an alternative residential design towards preserving existing topography.[3] The City's Environmental Review Committee adopted the City Planning Department's recommendation on February 9, 1977.

On February 16, 1977, the Environmental Review Committee transmitted to Kollsman an "Environmental Evaluation Form" which specified the areas which Kollsman was required to address in his EIR.[4]

On July 28, 1977, Kollsman submitted a first draft EIR. The first draft discussed project alternatives including the statutorily mandated "no project" alternative, Cal.Pub.

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[3]At this time, the City could lawfully require Kollsman to provide them with a focused EIR. Cal.Gov.Code § 65941, which became effective September 26, 1978, prohibits the City from requiring the applicant to submit the "informational equivalent of an environmental impact report as part of a complete application."

[4]The Evaluation Form states in pertinent part that "[t]he ERC [Environmental Review Committee] initial study indicates that impacts could occur from this project's implementation due to the following considerations: 1)Major Land Forms; 2) Hydrology; 3) Illumination; 4) Traffic; 5) Access; 6) Sanitary Sewers; 7) Solid Waste; 8) Water Runoff; 9) Public Facilities (police, fire parks, library.) An EIR should be prepared addressing all these impacts as well as project alternatives; appropriate mitigation measures; and energy conservation."

Resources Code, § § 21002, 21100, but did not address the impact of the slope-density formula on the Kollsman property, or a project alternative known as "cluster" housing.[5] On September 13, 1977, Kollsman submitted ten copies of a second draft EIR which was 58 pages long. The City circulated this draft to the various homeowners' associations.

On November 20, 1977, the Environmental Review Committee marked the Kollsman draft EIR as a "data base", and specified that "support data" on slope density and cluster alternatives was needed, as well as additional engineering information.[6] The requested engineering information was supplied by Kollsman's engineer on March 3, 1978. Slope density and cluster alternatives were not discussed in this report.

In a letter dated May 11, 1978, the Environmental Review Committee informed Kollsman that it would suspend processing of Kollsman's development application, since Kollsman, on the advice of legal counsel, did not specifically and independently discuss slope density and cluster project alternatives.[7]

On September 26, 1978 amendments to Cal.Gov.Code §65924 and 65925 became effective. Section 65941 prohibits the City from requiring of a development applicant "the informational equivalent" of an EIR.

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[5]Implemenation of the cluster alternative would have violated the local residential zoning classification which requires each lot to be an average minimum of 15,000 square feet.

[6]Shortly after the City made this request, Cal. Gov.Code § 65920 *et seq.*, which deals with Review and Approval of Development Projects, became effective on January 1, 1978.

[7]On May 12, 1978 in a letter to the City, Kollsman's engineer stated: "I sincerely regret that you are unable to complete a suitable draft EIR, but I cannot accept the inference that it is the lack of input from this office that is the cause of said inability."

Section 65924 requires that with respect to applications received prior to January 1, 1978, but not yet determined to be complete, the City must make such determination not later than 60 days after the effective date of amendment. This would have required the City to consider all of the information available to it, evaluate the information, and make a good faith determination of completeness or incompleteness of the Kollsman application no later than November 25, 1978.

[1] On November 22, 1978 the Planning Department notified Kollsman that his development application was incomplete. The reasons stated by the City were that (1) the Bureau of Engineering required additional information,[8] and (2) Environmental Assessment Data or an EIR was needed. It is important to note that at this time the City had the responsibility for preparing the EIR, Cal. Pub. Resources Code §21082.1, and could not lawfully, under Cal.Gov.Code §65924, require the informational equivalent of an EIR. The evidence establishes that by November 22, 1978, Kollsman had provided the City with sufficient environmental and engineering information to enable the City to prepare a legally adequate EIR. When this notification was sent to Kollsman, the City knew that it was insufficient for failure to indicate the manner in which the information could be made complete. The City knew by May 12, 1978 that Kollsman thought that all engineering information and environmental assessment data required by the City had already been furnished. In these circumstances, good faith as well as the specific provisions of Government Code §65943 required identification of any type of engineering information or environ-

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[8]The City does not specify in this notification what engineering information is needed, although Gov.Code § 65943 provides: "and shall indicate the manner in which [the application] can be made complete."

mental data still needed by the City to enable it to prepare an EIR. The City also knew that Kollsman had not previously hestitated to promptly comply with all of the City's requests for information.

In a document dated January 12, 1979, the City informed Kollsman that it could not schedule a public hearing regarding approval of his tract application until "specified items have been completed." The document indicates that environmental clearance was required, and that the Planning Department was waiting for completion of a "full EIR."

A reasonable construction of this document would indicate that the Planning Department could not schedule a public hearing because it did not have clearance from the Environmental Review Committee. Environmental clearance may not be given by the Environmental Review Committee without completion of a full EIR. Since it is the City's responsibility to prepare the full EIR, it is manifestly unjust that Kollsman should be penalized on the basis of submitting an "incomplete" application, when the material which would have made the application complete, *viz.*, a full EIR, was being withheld by the City itself. All circumstances which the evidence disclosed being considered, the lack of specificity in the City's notices to Kollsman is quite apparently deliberately vague.

On November 14, 1979, the City gave Kollsman notice of intent to disapprove his aplication without prejudice. The notice states in part: "It is the intent of the Advisory Agency to administratively disapprove all pending cases approaching the one year deadline whenever a determination of approval cannot be made due to lack of submission of sufficient information."

It is unclear why the City would feel compelled to approve or disapprove Kollsman's application before the

one year deadline imposed by Cal.Gov.Code § § 65950 and 65956. These sections apply only to *complete* applications. If Kollsman's application was as the City argues, incomplete for lack of sufficient information, there was no need for the City to meet the deadline imposed by §65950. The City was free, under § 65956, to disapprove the application for lack of completeness at any time, if it felt that Kollsman was not, with reasonable diligence, supplying information sufficient for completeness. *See* Sahm, *Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think*, 19 Santa Clara L.Rev. 579 (1979); Cal.Gov.Code § 65956(b).

Shortly thereafter, on November 26, 1979, the City gave Kollsman notice that his development application was disapproved because he "failed to provide the requested information." Kollsman did not appeal this decision to the City Planning Commission.[9]

DISCUSSION AND DECISION

A. *Kollsman Properly Amended His Complaint to Conform to the Evidence Pursuant to Rule 15(b).*

Rule 15(b) of the Federal Rules of Civil Procedures provides:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried

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[9]A "Stipulation and Order" signed by Kollsman and the City on December 11, 1979 states that "[i]t is hereby stipulated between Plaintiffs and Defendant, by and through their respective attorneys of record, that the running of the time for the filing of an appeal to the City Planning Commission from the action of the Advisory Agency in the matter of Tentative Tract No. 33300 be tolled from November 26, 1979 to and including the date upon which judgment in this matter becomes final. It is further stipulated that the aforesaid stipulation shall not affect the ability of either party to raise issues of fact and law in any phase of the instant action."

> by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[2] Rule 15(b) was designed to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities. 6 Wright & Miller, *Federal Practice & Procedure,* § 1471, p. 359 (1971); *Hardin v. Manitowoc-Forsythe Corp.,* 691 F.2d 449 (10th Cir. 1982). "It is well-settled that the amendment of pleadings to conform to proof under Rule 15(b) of the Federal Rules of Civil Procedure rests in the sound discretion of the trial court." *Cole v. Layrite Products Co.,* 439 F.2d 958 (9th Cir. 1971) (citations omitted), *quoted with approval* in *Gonzales v. United Staes,* 589 F.2d 465 (9th Cir. 1979); *Save Lake Washington v. Frank,* 641 F.2d 1330 (9th Cir. 1981). Leave to amend is to be freely given "when justice so requires," Fed.R.Civ.Pro. Rule 15(a); *Stiles v. Gove,* 345 F.2d 991 (9th Cir. 1975), and refusal to grant leave to amend

without any justifying reason is an abuse of the trial court's discretion. *Foman v. Davis* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

[3] Rule 15(b) permits amendment of the complaint to conform to the evidence at any time during the proceedings, even after judgment, when the unpled issues have been tried by express or implied consent of the parties. As stated recently by the Tenth Circuit, "[t]he test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment" *Hardin v. Manitowoc-Forsyth Corp. supra* at 456. Consent will generally be found where the party objecting to the motion to conform acquiesced in the introduction of evidence bearing on the new issue, or himself produced evidence on the new issue. *Hardin v. Manitowoc-Forsythe Corp., supra* at 457; *Dering v. Williams,* 378 F.2d 417 (9th Cir. 1967).

[4] The record makes it clear that the City made no objection to the admission of evidence which made apparent that the objective of the litigation might be attainable without adjudicating the constitutional issues. The evidence was largley documentary in nature at the time it was introduced. In fact, the City itself introduced through documents and testimony much of the evidence which formed the basis of the claim under Cal.Gov.Code § 65920 *et seq.* Under these circumstances, the Court finds that the City gave implied consent to the trial of the issues raised by the amendment to conform to the evidence.

[5,6] The City argues that the lapse of time between the trial and Kollsman's motion to conform unduly prejudiced the City because it prevented it from having a fair opportunity to conduct discovery, present appropriate

pre-trial motions, and present full evidence on the issues raised by the amendment. This argument was rejected for two reasons. First, delay alone cannot defeat a Rule 15 motion to amend. *See Bertrand v. Sava,* 535 F.Supp. 1020 (S.D.N.Y. 1982). Second, the City had the opportunity, if it so chose, to request additional evidentiary hearing at the time Kollsman's motion for leave to amend was granted pursuant to Rule 15(b). The City made no such request.

[7] An additional reason for allowing amendment of Kollsman's complaint lies in the time-honored principle that, whenever possible, controversies should be decided on non-constitutional grounds, *Ashwander v. Valley Authority,* 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). The Court concludes that a Rule 15(b) amendment to conform to the evidence was proper.

B. *Exhaustion of Administrative Remedies*

While not a matter of jurisdiction of the subject matter, there are situations which require exhaustion of administrative remedies as a prerequisite to the availability of judicial relief. The facts which support relief under Count VII require a discussion of this subject.

As initially noted, Plaintiff, Kollsman, is a citizen of the State of New York, and the Defendant, the City of Los Angeles, is a California municipal corporation. Diversity jurisdiction is accordingly conferred pursuant to 28 U.S.C. § 1331. The record indicates, however, that under the Los Angeles Municpal Code, Kollsman was entitled to appeal the City's disapproval of his tract application to the City Planning Commission, but elected not to do so. Instead, both parties, pursuant to a stipulation dated December 11, 1979, agreed to suspend the running of the time for the filing of an administrative appeal, pending the outcome of this case. The stipulation states in pertinent part that "the

aforesaid stipulation shall not affect the ability of either party to raise issues of fact and law in any phase of the instant action."

[8-10] It is axiomatic that the subject matter jurisdiction of the federal court may not be conferred by consent of the parties. *California v. La Rue,* 409 U.S. 109, 111, n. 3, 93 S.Ct. 390, 394, n. 3, 34 L.Ed.2d 342 (1972). Exhaustion of administrative remedies, however, is not a federal jurisdictional requirement, but a "prudential consideration." *Steere Tank Lines, Inc. v. ICC* 675 F.2d 763, n. 5 (5th Cir.1982). When not mandated by federal statute, the requirement that a plaintiff exhaust available administrative remedies prior to filing a claim for relief in federal court may be waived by the defendant. *Holloway v. Gunnell,* 685 F.2d 150, 152, n. 2 (5th Cir.1982). In the instant case, the City waived the exhaustion requirement by signing the stipulation of December 11, 1979.

There have been few cases which interpret the California code sections which are involved in this case and little likelihood that the future will bring State Court decisions on applications which were filed prior to January 1, 1978 and remain undetermined. In this respect, the Kollsman case may be unique. At least the possibility of additions to the species has long been extinct. So where statutes may require interpretations, it is necessary for this court to proceed.

C. *Completeness of the Kollsman Application.*

California Government Code Sections 65920 *et seq.*,[10] which became effective in 1978 while this case was pending, were intended by the California Legislature to "streamline the permit process for development projects." Sahm, *Project Approval, supra* at 588. Cal.Gov.Code Section 65921 provides:

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[10]Sometimes referred to as Development Act.

> The Legislature finds and declares that there is a statewide need to ensure a clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects. Consequently, the provisions of this chapter shall be applicable to all public agencies, including charter cities.

When read in conjunction with the provisions of the California Environmental Quality Act, Cal.Pub. Resources § 21000 *et seq.*, the Development Act represents a comprehensive statutory scheme for the regulation of development application processing by local agencies.[11]

Included in the prescribed development application procedures is an environmental review process which analyzes the impact of the proposed development on the environment.[12] To further streamline the permit process for development projects, the Legislature found it necessary to expedite decisions on such projects by establishing deadlines for phases of the permit process. For failure to meet the deadlines, the Legislature provided that the applications would be deemed complete or the project approved.

Section 65924 of the Government Code states in pertinent part that "[w]ith respect to such application received prior to January 1, 1978, but not determined to

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[11]Section 65930 defines "local agency" as "any public agency other than a state agency."

Section 65932 defines "public agency" as any state agency, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." Under the definition of these terms, the City is clearly a "local agency" within the meaning of the Development Act.

[12]*See* note 2 and accompanying text.

be complete as of that date, determination that the application is complete or incomplete shall be made no later than 60 days after the effective date of the act amending this section in 1978." Since the Kollsman tract application, which was submitted on January 12, 1977, had not been determined to be complete or incomplete as of January 1, 1978, the City was required, under Section 65924, to make that determination not later than 60 days after September 26, 1978, the effective date of the statute.

[11] In a document dated November 22, 1978, Kollsman was informed by the City that his development application had been determined to be incomplete. While this document was transmitted within the 60 day time constraint of Section 65924, it was not a document which conformed to statute and was therefore not legally sufficient to constitute the determination required by law. It was not based on a determinination which the Development Act seeks to effectuate. This subject is further discussed below.

Section 65940 of the Government Code requires the State of California to compile and make available one or more lists which specify in detail the information required from any development project applicant.[13] Section 65941 requires that the information to be compiled pursuant to Section 65940 include the criteria which the City applies in order to determine the completeness of any application.[14]

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[13]Section 65940 provides: "Not later than June 30, 1978, each state agency shall compile one or more lists which shall specify in detail the information which will be required from any applicant for a development project. Copies of such information shall be made available to all applicants for development projects and to any person who requests such information."

[14]Section 65941 provides: "[t]he information compiled pursuant to Section 65940 shall also indicate the criteria which such agency will apply in order to determine the completeness of any application submitted to it for a development project.

As of November 22, 1978, or at the very latest, January 12, 1979,[15] the only information missing from the Kollsman tract application according to the list proposed by the City, was a "full EIR", which the City maintained should include discussion of slope density and cluster project alternatives.

As noted above, it was the duty of the City to prepare the "full EIR." Under Section 65941, the City may not lawfully require Kollsman to submit "the informational equivalent of an environmental impact report" as part of a complete development application,[16] although it may require "sufficient information to permit the agency to make the determination required by Section 21081.1 of the Public Resources Code."[17]

Assuming *arguendo* that Kollsman did not submit the informational equivalent of an EIR, Cal.Gov.Code Section 65941 prohibits the City from declaring the Kollsman application incomplete on that basis. It is clear from a

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[15]The document dated January 12, 1979 indicates that only environmental clearance was requred before the City could schedule a public hearing regarding approval of the Kollsman tract application.

[16]The amendment to Section 65941, effective September 26, 1978, provides that "[i]n the event that a public agency is a lead agency for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code, such criteria shall not require the applicant to submit the informational equivalent of an environmental impact report as part of a complete application; provided, however, that such criteria may require sufficient information to permit the agency to make the determination required by Section 21080.1 of the Public Resources Code."

[17]Cal.Pub.Resources Code § 21080.1 provides in pertinent part that "[t]he lead agency shall have the responsibility for determining whether an environmental impact report or a negative declaration shall be required for any project subject to the provisions of this division." A negative declaration is a declaraton that there is no environmental impact and that an EIR is not required. See Cal.Pub. Resources Code §21064.

preponderance of the evidence, however, that not only did Kollsman submit information sufficient to enable the City to determine whether an EIR or negative declaration should be made, but he also submitted information sufficient to enable the City to draft a legally adequate EIR.

A certified copy of the City's guidelines for the implementation of the California Environmental Quality Act of 1970 provides in Article VI, § i(7):

> 7. *The Final EIR*
>
> a. *Contents of the Final EIR.*
>
> The final EIR shall be prepared by the Lead City Agency and shall consist of the following:
>
> (1) The Draft EIR;
>
> (2) A list of persons, organizations, and public agencies commenting on the Draft EIR;
>
> (3) The comments and suggestions received on the Draft EIR, verbatim or in summary;
>
> (4) The responses of the Lead City Agency to significant environmental points raised in the review and consultation process;
>
> (5) A brief summary of the significant information contained in the EIR; and
>
> (6) A certification prepared by the Lead City Agency pursuant to subsection 2 of this section.

Although he was not legally required to, Kollsman submitted to the City the informational equivalent of an EIR. As can be observed from the City's own guidelines stated above, the only steps remaining for completion of a final EIR were to be taken by the City.

Section 21002 of the Pub.Resources Code,[18] and the

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[18] Cal.Pub.Resources Code § 21002 provides in pertinent part that "[t]he Legislature finds and declares that it is the policy of the

cases interpreting CEQA, make it clear that a legally adequate EIR need not discuss *all* alternatives, but merely reasonable, or feasible[19] alternatives. In *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco,* 106 Cal.App.3d 893, 165 Cal.Rptr. 401 (1980), the court held that:

> [a]n EIR must describe all reasonable alternatives to the project (Pub.Resources Code §21061), including those capable of reducing or eliminating environmental effects; the specific alternatives of "no project" must also be evaluated (Pub.Resources Code, § § 21002, 21100; Guidelines, Cal.Admin.Code, tit. 14, § 15143, subd.(d)). The discussion of alternatives need not be exhaustive and the requirement as to the discussion of alternatives is subject to a construction of reasonableness. The statute does not demand what is not realistically possible, given the limitation of time, energy and funds. 'Crystal ball' inquiry is not required.
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> The statutory requirements for consideration of alternatives must be judged against a rule of reason. There is no need for the EIR to consider an alternative whose effect cannot be reasonably

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state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmenal effects of such projects, and that the procedures required by this division are intended to assist public agencies in substantially identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measure which will avoid or substantially lessen such significant effects."

[19]Cal.Pub.Resources Code § 21061.1 defines the term "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors."

> ascertained and whose implementation is deemed remote and speculative.

106 Cal.App.3d at 910, 165 Cal.Rptr. at 410 (citations ommited).

In the instant case, Kollsman and his engineers made outstanding efforts to supply the City with information sufficient to allow the City to produce a legally adequate EIR. Kollsman submitted a first draft EIR on July 18, 1977. This EIR draft discussed the statutorily mandated "no project" alternative and two alternative projects.[20] On September 15, 1977, Kollsman submitted a second draft EIR which the City circulated among members of local homeowners' associations. At the City's request, Kollsman submitted further information on March 3, 1978, which included radius and topographical maps, blue prints, a summary of the existing flora on the site, and grading information.

The City's response to the efforts of Kollsman and his engineers in obtaining and submitting this environmental and engineering information has been and continues to be that the information provided is inadequate to enable the City to complete a draft EIR. Specifically, a letter to Kollsman's engineer from the Environmental Review Committee, dated May 11, 1978 states:

> A discussion of the impact of the slope density formula and an analysis of alternatives to the proposed project (Item 5), both critical to the completion of the EIR are still outstanding.
>
> * * * * * * * * * * * * * * * * * *

---

[20]The alternative projects discussed were a 42-43-*lot* subdivision and an 85-*lot* subdivision. Kollsman's engineers concluded that "[t]o develop the property at RE 15-1-H, its current zoning, would permit the construction of up to 247 dwelling units, and would adversely impact the character of the surrounding community."

> Until this information is provided by your office, I am unable to complete a Draft EIR suitable for public circulation.

At the very least, this statement is incredible. By September 13, 1977, the City had already circulated Kollsman's second draft EIR to the local homeowners' associations. Moreover, the standards for a legally adequate EIR, as articulated in *Architectural Heritage, supra* do not require the City to discuss the impact of the slope-density formula on the Kollsman property, for three reasons. First, CEQA does not require the discussion of project alternatives to be exhaustive. Second, only those alternatives whose effects are reasonably ascertainable, and whose implementation is not remote and speculative, need be discussed. The testimony presented at trial indicates that implementation of the slope-density formula to the Kollsman property, or any property for that matter, would have had effects not reasonably ascertainable, since even the City's Planning Officers could not consistently apply the formula. The number of lots allowed by the formula is entirely dependent upon the method of calculation employed,[21] which may be artbitrarily selected at the discretion of City Planning Officials.[22] Since CEQA would not have required such an arcane discussion in a draft EIR, the City may not require Kollsman to provide such a discussion as part of a complete application.[23]

---

[21]For example, depending on the method of calculation used, Kollsman would be permitted to divide his 85 acres into either a maximum of 9 building lots, or a maximum of 4 building lots.

[22]Whether the slope-density formula is so vague and arbitrary as to constitute a violation of some provision of the United States Constitution is a question that need not be decided today.

[23]Furthermore, it is unclear why the City should require the developer to discuss the implementation of the formula to developer's property, when the City has all the necessary information to make the

Third, CEQA requires only discussion of "feasible" alternatives. As defined in CEQA, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Cal.Pub. Resources Code § 21061.1. Development of the Kollsman property according to the slope desnity formula would not have been economically feasible. This was obvious to the City from Kollsman's discussion of reducing the number of units as an alternative. Accordingly, no independent or further discussion of it was required.

[12] An overwhelming preponderance of the evidence establishes that by November 22, 1978, Kollsman provided the City with sufficient environmental, engineering, and geological information to enable the City to prepare a legally adequate EIR. Since Kollsman had provided the information necessary from completion of an EIR by the City, the City could not in good faith refuses to accept the

---

assessment itself. The City enacted an ordinance which limits development of property by a novel and abstruse mathematical formula. Since the City is responsible for creation of the formula, it should know best how it is to be interpreted and applied. The City could have discussed it in the EIR if it chose to do so.

The City argues that without a discussion of the application of the slope density formula to the subject property, which the City insists Kollsman was required to submit, it could not complete a legally adequate EIR and proceed with the processing of Kollsman's application. This argument is patently frivolous and was contradicted by the City's own witness, Mr. Gary Morris, a Deputy Advisory Agency in the City's Planning Department. In a hearing conducted on April 22, 1981, the following colloquy took place between the court and Mr. Morris:

THE COURT: I think that the testimony in this case has indicated that they apply slope-density formula, and that limits the number of units that can be built on the site. That doesn't have anything to do with the environmental impact or anything, and it is an immutable figure which can't be exceeded. Do you subscribe to that?

THE WITNESS: Yes, I do.

Kollsman application as complete on the grounds that it could not prepare an adequate EIR. The action of the City in refusing to certify the Kollsman application as complete was contrary to the policies expressed in the Development Act and CEQA, is ineffective and, as will further shown, should be disregarded.

It has been pointed out that the Legislature intended to provide a comprehensive plan for the expedition of processing applications for development. It is certain that this intention was that in the means of expedition of processing, all applications should be treated alike. In this respect the Legislature inadvertently overlooked reference to applications initiated prior to January 1, 1978. That this was inadvertent is evidenced by the fact that there is no substantive reason for differentiation. In this context it is important to remember that the Kollsman application was initiated on January 12, 1977 by submitting a Tentative Tract Map to the City Planning Department and that it was in the same year, 1977, that in Cal.Gov.Code § 65921 the Legislature found and declared that a need existed for specific requirement for the approval of development projects and to expedite decisions on such projects. The resulting comprehensive remedial legislation is a reflection of long existing abuses of administrative processes. Applications which have been long pending represent the greatest need for expedition. It is beyond speculation that the legislation enacted in 1977, 1978, and 1979 to expedite development applications was and is intended to apply to all applications, those initiated before January 1, 1978.

As already mentioned, the statutes which comprise Chapter 4.5 of the Cal.Gov.Code were enacted in 1977. Those provisions regarding land development applications filed prior to January 1, 1978 and not determined to be complete did not identify for official action could be

measured. In 1978, the legislature adopted an amendment to Section 65924, a part of Article 1, to rectify this omission. The amendment provided: "with respect to such application received prior to January 1, 1978, but not determined to be complete as of that date, a determination that the application is complete or incomplete should be made not later than 60 days after the effective date of the act amending this section in 1978." The effective date of this amendment was September 26, 1978. The Kollsman application fell into the category described in the amendment. This amendment of the 1977 legislation is a reaffirmation of the legislative intent referred to above.

Section 65943, a part of Article 3 entitled *"Applications for Development Projects:* completeness of application; determination; time; specification of parts not complete and manner of completion," reads as follows:

> Not later than 30 calendar days after any public agency has received an application for a development project, such agency shall determine in writing whether such application is complete and shall immediately transmit such determination to the applicant for the development project. *If such written determination is not made within 30 days after receipt of the application, the application shall be deemed complete for purposes of this chapter.* In the event that the application is determined not to be complete, the agency's determination shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete."

The emphasis indicates an addition to the statute which was added in 1979, effective October 2, 1979.

The portion of Section 65943 relevant to this discussion is the last sentence, "In the event that the application is determined not to be complete, the agency's determinations shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete."

The court concludes that wherever in Chapter 4.5 of the Government Code a determination of incompleteness is made, the contents of the determination is governed by Section 65943 in that "the agency's determination shall specify those parts of the application which are incomplete and shall indicate the manner in which they can be made complete."

The written determination of incompleteness made by the City and transmitted to Kollsman does not comply with the letter or the substance of the statutory requirements. It is defective and inadequate to accomplish the statutory purpose. It is no more than a title without substance, an empty shell, which does not attempt to conform to the legislative purpose which, as the court sees it, is an instruction to the City to be helpful by being specific, not only in the respects which the City considers the application incomplete but in addition thereto telling him exactly what he might do to make it complete. As a consequence, the document sent to Kollsman on November 22, 1978 entitled "Determination of Incompletness of Application" is ineffective as the document required by Section 65924 in light of the provisions of the last sentence of Section 65943 and that the document should be disregarded.

As was previously pointed out, there was nothing to compel the City to make a determination as to the completeness or incompleteness of an application until 60 days after September 26, 1978 when Cal.Gov.Code § 65924 became effective. Even though as early as May 12,

1978, it was apparent to the City that Kollsman knew of no environmental information or engineering information or other information which the City could lawfully require an applicant to furnish, the City made no determination as to completeness or incompleteness. On the contrary, the City suspended processing the application. After the effective date of Section 65924, this posture did not change despite amendment to Section 65941 providing that the informational equivalent of an EIR could not be required. The document of November 22, 1979 shows that at that time, the City was still asserting a lack of the informational equivalent of an EIR. The court concludes that the City did not proceed to make a bona fide determination of completeness or incompleteness at any time prior to November 22, 1978.

[13] The City was familiar with the statutory provisions. The insufficiency of the notice given indicates that the City had no intention to actually specify any particulars in which the application could be said to be incomplete because there was no additional information which could be lawfully required.

It was the intent of the legislature that in the event of failure to meet the substantive requirements prescribed in Section 65943 within the time limits, the application should be deemed complete. Further, the court finds as a fact that the information which could legally be required by the City was supplied to the City and the application was in fact complete. The court concludes that in all respects the application must be deemed complete for the purposes of Cal.Gov.Code Chapter 4.5 and deemed accepted as complete as of November 22, 1978.

D. *Approval of the Kollsman Application*

Section 65950 of the Government Code provides in pertinent part: "Any public agency which is the lead

agency for a development project shall approve or disapprove such project within one year from the date on which an application requesting approval of such project has been received and accepted as complete by such agency." Section 65956(a) provides that "[i]n the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, such failure to act shall be deemed approval of the development project." Under Sections 65950 and 65956, the City was required to approve or disapprove the Kollsman application within one year of the date it became complete, November 22, 1978.

The law provides that the time limits for action on applications are maximum time limits and that public agencies shall, if possible, approve or disapprove development projects in shorter periods of time. Cal.Gov.Code § 65953. That it could have been and should have been found complete long before the expiration of 60 days from September 26, 1978 has been discussed. The City anticipated the expiration of the 60 day time limit for determining that the application was complete or incomplete by 3 days. However, in near total disregard of Section 65953, the City's action on processing applications was limited to compliance with maximum time limits as calculated by the City. This calculation of the maximum time limit to approve or disapprove a development project as required by Section 65956 was calculated as being 60 days from the effective date of Section 65924, September 26, 1978, plus one year, or November 26, 1979.

[14] Adhering to this method of calculation, it was by letter dated November 26, 1979 that the City advised Kollsman that his development application was disapproved for lack of completeness. However, the action as

to a determination of completeness or incompleteness of an application was taken by the City on November 22, 1978. Since the court has ruled that this action is to be taken as accepted as complete, the maximum time limit prescribed by Section 65950 expired one year from November 22, 1978 and the action taken by the City on November 26, 1979, was in excess of the one year time limit. The City failed to act to approve or disapprove the Kollsman development project within the time limit of Section 65956 and it is therefore deemed approved as provided in Section 65956.

The notice of November 14, 1979 reads like a stroke of conscience. The Kollsman tract number and the applicant's filing date were noted. It indicates that the one-year deadline for approval or disapproval of the project was approaching and that the City intended to disapprove the project on November 21, 1979, one day before expiration of the deadline. But the deadline passed before the disapproval which was not forthcoming until November 26, 1979. The notice of November 14, 1979 reflects an awareness that the Kollsman application was complete in fact on November 22, 1978. In this case, the consequences of missing the deadline are just.

It is found and determined that there is no just reason for delay in the entry of judgment on this claim. Judgment on Count VII should be entered as a final judgment on this claim.

Plaintiff is entitled to judgment that his development project, which is identified by reference to Tentative Tract Map 33300, should be deemed approved subject to timely determination of ordinary and reasonable conditions to the recordation of a final tract map as otherwise provided by law.

ENTERED
FEB 2 1983
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
FEB - 1 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

United States District Court for the Central District of California

PAUL KOLLSMAN; TASHI LAND CORPORATION, a New York corporation

Plaintiffs,

v.

CITY OF LOS ANGELES, a municipal corporation

Defendants

Judgment

CV 77-770 ALS

This action came on for trial before the Court, Honorable Albert Lee Stephens, Jr., District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

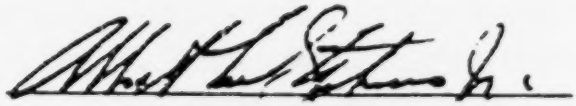
Plaintiff Kollsman's development project which is identified by reference to Tentative Tract Map 33300 shall be deemed approved (Cal. Gov. Code §65956) subject to timely determination of ordinary and reasonable conditions to the recordation of a final tract map as otherwise provided by law.

More than one claim for relief is presented in this action. This judgment is on one claim embodied in Count VII and

is not an adjudication of any other claim. The court has determined that there is no just reason for delay in entry of judgment on this claim. Judgment on Count VII should be entered as a final judgment on this claim. Accordingly, the Clerk is directed to enter this judgment. (Federal Rules of Civil Procedure 54 (b)).

The Court reserves jurisdiction over all other claims.

Dated at Los Angeles, California, this 31st day of January, 1983.



Albert Lee Stephens, Jr.
United States District Judge

California Government Code Section 65950.

§65950. Public lead agency; approval or disapproval of project; time

Any public agency which is the lead agency for a development project shall approve or disapprove such project within one year from the date on which the application requesting approval of such project has been received and accepted as complete by such agency. As specified in Sections 21100.2 and 21151.5 of the Public Resources Code, the period specified in such sections shall also begin on such date.

California Government Code Section 65956.

§65956. Hearings; failure to timely approve or disapprove or to submit adequate information

(a) If any provision of law requires the lead agency or responsible agency to hold a public hearing on the development project and the agency has not held such hearing at least 60 days prior to the expiration of the time limits established by Sections 65950 and 65952, the applicant or his or her representative may file an action pursuant to Section 1085 of the Code of Civil Procedure to compel the agency to hold such hearing and the court shall give such proceedings preference over all other civil actions or proceedings, except older matters of the same character.

(b) In the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, such failure to act shall be deemed approval of the development project.

(c) Failure of an applicant to submit complete or adequate information may constitute grounds for disapproving a development project.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 4, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 4, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)

Office-Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-883

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EVA KOLLSMAN, CITY NATIONAL BANK,
Petitioners,

vs.

CITY OF LOS ANGELES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is it necessary for this Court to review a determination by the Court of Appeals for the Ninth Circuit that abstention is appropriate where a state law question concerning whether a land subdivision is approved by operation of law was found to be uncertain, where the dissenting opinion in the Court of Appeals and the memorandum decision of the District Court reached directly contrary conclusions with respect to the proper interpretation of the state statutes at issue, and where the resolution of the state law question could moot or present the federal constitutional questions in a different posture?

2. Whether the delay in deciding the federal constitutional questions should be considered in determining whether abstention is appropriate, where the federal questions would have been resolved by the District Court but for petitioners' post-trial request to reopen the case to present their state law question, where petitioners subsequently did not oppose entry of a final judgment on only the state law question by the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and where the dissenting opinion in the Court of Appeals upon which petitioners rely for their argument that abstention is inappropriate concludes that

petitioners' state law theory is clearly erroneous?

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No. 84-883

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

EVA KOLLSMAN, CITY NATIONAL BANK

Petitioners,

vs.

CITY OF LOS ANGELES

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent City of Los Angeles respectfully opposes the Petition for Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

This is a land use case wherein petitioners seek to avoid the application of the "slope density formula" of the general plan of the City of Los Angeles ("City") to their proposed hillside subdivision located in the Santa Monica Mountains. Under the slope density formula the allowable density decreases from a maximum of one unit per acre to a minimum of one unit per 20 acres as the slope of the land and the corresponding impacts of development increase. Petitioners own 120 acres and seek to develop 70 lots on 85 acres. Petitioners' proposed 70-lot subdivision project would require the

grading of over two million cubic yards of earth and would cut up to 36 feet from the tops of natural hills. RT (1979) at 368-371. Because of the extreme steepness of petitioners' land (82% of the land has a slope of 35% or more; RT (1979) at 754), the slope density formula would permit a subdivision of no more than 9 lots on the 85 acres.

Petitioners filed a six-count complaint on March 1, 1977. CR 1. Counts I and III sought to invalidate the slope density formula of the general plan on constitutional theories of inverse condemnation and equal protection, respectively. Count II sought damages of $6.3 million on an inverse condemnation

theory. Counts IV, V and VI were various state law theories which were dismissed before trial upon motions by the City. CR 8 and 87. On March 15, 1978, the City filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit arguing the complaint was not ripe for adjudication and that the District Court was required to abstain. On June 7, 1978, the Court of Appeals denied the City's petition for writ of mandamus. A seven-day court trial of Counts I, II and III was held in March and April, 1979.

On March 21, 1980 petitioners filed a "Motion to Reopen to Submit Additional Evidence" which raised for the first time an argument that the

subdivision application had been "deemed approved" pursuant to California statutes. CR 153. On March 28, 1980, the City filed opposition to the motion to reopen. CR 155. On March 5, 1981, the District Court ordered a further hearing. CR 162. Two additional days of trial were held in April, 1981 where, inter alia, the City presented testimony and evidence regarding the City's administrative processing of petitioners' subdivision application. RT (1981) at 152-263.

On November 30, 1981, the District Court issued a minute order stating, without further explanation: "On the issue of liability the court finds for the plaintiff and against the

defendant" and directing counsel to confer and to submit to the court a draft of proposed findings of fact and conclusions of law. CR 172; see also CR 173. On February 22, 1982, over the City's opposition (CR 180), the District Court granted petitioners' motion to amend the complaint to conform to proof by adding Counts VII and VIII (CR 184), after the District Court had suggested such motion be filed (Petition, App. at C-4). Count VII is the "deemed approved" claim. Count VIII is a 42 U.S.C. Section 1983 claim which "has not been litigated." Ibid. On February 2, 1983, the District Court issued its memorandum decision finding petitioners' proposed subdivision to

be approved by operation of state law. Petition, App. C. Judgment was entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Petition, App. D.

On July 17, 1984 the Court of Appeals for the Ninth Circuit issued an opinion vacating the decision of the District Court. Petition, App. A. On September 5, 1984 the Court of Appeals denied a petition for rehearing and rejected the suggestion for a rehearing en banc, with no judge of the full court requesting a vote on the suggestion for rehearing en banc. Petition, App. B.

SUMMARY OF ARGUMENT

Abstention is appropriate in this case because there is an uncertain question of state law whose resolution might moot, or present in a different posture, the federal constitutional questions presented. The abstention doctrine followed by the Ninth Circuit Court of Appeals is consistent with the opinions of both this Court and the other circuits of the Court of Appeals.

Although petitioners contend the question of state law presented is certain, they fail to identify whether they agree with the District Court's interpretation of the state statutes or that of the dissenting judge in the

Court of Appeals, who found the District Court's analysis to be "clearly erroneous." Plainly, if petitioners cannot bring themselves to identify to this Court which of two mutually inconsistent resolutions of the state law question they find to be correct, or to explain why the other resolution is so clearly erroneous it may be safely disregarded as creating no uncertainty, they cannot seriously complain that the Court of Appeals majority was unable to resolve this conflict and instead found the state law question to be uncertain.

Petitioners' complaint regarding the "delay" abstention may cause if they now pursue their state law claim in state court should be disregarded.

It was petitioners' own litigaton strategy, by which petitioners reopened the case in 1980 to raise their state law claim after trial of the federal constitutional issues had been conducted in 1979, which has resulted in a delay in resolution of the federal constitutional issues to date.

ARGUMENT

I.

IT WAS PROPER FOR THE COURT OF APPEALS TO DIRECT ABSTENTION WHEN IT FOUND THE QUESTION OF STATE LAW TO BE UNCERTAIN

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) articulated

standards for abstention in cases where the federal constitutional issues presented could be affected by the resolution of unsettled questions of state law.[1/] As stated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959):

> "Abstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of state law.'"

1/ Counts I and III of the complaint will be moot if the subdivision herein is "deemed approved" and Count II will at least be presented in a different posture.

In Pennhurst State School & Hospital v. Halderman, 465 U.S. ___, 79 L.Ed.2d 67, 92-93 (1984), this Court recently stated:

> "Under the abstention doctrine, unclear issues of state law commonly are split off and referred to the state court."

The grounds for Pullman abstention were most recently reviewed in Hawaii Housing Authority v. Midkiff, 467 U.S. ___, 81 L.Ed.2d 186, 194 (1984):

> "In Railroad Comm'n v. Pullman Co., supra, this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal

> questions and 'needless friction with state policies . . . .'"

In Hawaii Housing Authority v. Midkiff, while reversing on other grounds, this Court upheld the determination of the Court of Appeals for the Ninth Circuit that abstention was not appropriate because there was no uncertain question of state law presented. In the present case the Court of Appeals for the Ninth Circuit has found the issues of state law are uncertain and that abstention is therefore appropriate. The dissenting judge in the Court of Appeals would reverse the District Court on the merits, finding the District Court's interpretation of state law to be clearly wrong.

The City believes that the interpretation of state law by the dissenting judge in the Court of Appeals is correct. However, the majority panel of the Courts of Appeals, which cogently and correctly identified the complex state law issues presented, found their resolution to be uncertain. That conclusion should not now be disturbed. Certainly the determination of whether or not state issues are too uncertain to be properly decided is a question uniquely within the judgment of the Court of Appeals panel which examined in detail the specific state law questions at issue. Sound principles of judicial economy necessitate a

degree of deference to that determination. The Court of Appeals for the Ninth Circuit recognized this when no judge of the full court requested a vote on the suggestion for rehearing en banc. None of the considerations governing review on certiorari of Rule 17 of the Rules of the Supreme Court suggest it is appropriate to request that this Court now review the various California statutes at issue to determine whether it finds their interpretation to be certain or uncertain.

Contrary to petitioners' claim, the Court of Appeals for the Ninth Circuit does not interpret the abstention doctrine in a manner at variance with other circuits of the

Court of Appeals. A number of the circuits have suggested abstention would be appropriate in land use contexts. See, e.g., Caleb Stowe Associates Ltd. v. County of Albemarle, 724 F.2d 1079, 1080 (4th Cir. 1984) following Fralin & Waldron, Inc. v. City of Martinsville, 493 F.2d 481 (4th Cir. 1974); Nasser v. City of Homewood, 671 F.2d 432, 440 n. 7 (11th Cir. 1982) citing with approval Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 747 (3d cir. 1982), cert. denied 456 U.S. 990, citing with approval Hill v. City of El Paso, supra.

In each of the cases cited by petitioners for the proposition that

the Court of Appeals for the Ninth Cirucit is out of step with other abstention decisions (Petition at page 14, last paragraph) the court found no uncertain question of state law to be present. The Court of Appeals for the Ninth Circuit similarly rejects abstention in land use cases where no uncertain state law issues are found. See Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983); Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), reversed on other grounds in Hawaii Housing Authority v. Midkiff, supra. None of the cases cited by petitioners indicated abstention would not be appropriate in a land use case if an uncertain question of state law which

might moot or present federal constitutional issues in a different posture had, in fact, been found.

II.

THE PETITION FAILS TO EXPLAIN HOW THE STATE LAW QUESTIONS CAN BE RESOLVED WITH CERTAINTY

The Petition is notable in that its argument fails to contain a section contending the state law issues presented herein are not uncertain. The bald assertion that "the state law is clear" is made (Petition at 15) without amplification. Petitioners rely upon the District Court's findings (Petition at 3, note 3), and upon

Judge Reinhardt's rejection of abstention. Nowhere do petitioners state which judge's interpretation of the state law issues they find to be correct and certain. The two opinions cannot be reconciled. Judge Reinhardt stated the following concerning the District Court's findings:

> "The district court, intentionally or otherwise, circumvented the provisions of California law by finding as a matter of fact that the City had accepted Kollsman's application as complete. Because its critical finding of fact is so clearly erroneous, the district court's decision cannot stand. It is obvious from the record before us that the City did the precise opposite of that which the district court says it did. The City <u>expressly</u> found that the application was incomplete, not complete. Moreover, even

> if, under California law, Kollsman's application could have been deemed complete, that event would not have occured until several days late on November 26, 1978. Even in that case, the City could not be deemed to have approved the application, for the City subsequently explicitly disapproved the application in a timely manner. Thus, contrary to the district court's assertion, it is absolutely clear that the city never approved the application, explicitly or by operation of law." Petition, App. at A-17.

If petitioners contend that the District Court's resolution of the state law question is correct[2/], they must then explain why Judge Reinhardt's directly contrary conclusion does not create exactly the uncertainty regarding the correct

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2/ Please see note 4, infra.

resolution of the state law questions which led the majority of the Court of Appeals to direct abstention herein. Alternatively, if Judge Reinhardt is correct and petitioners' state law theory is "clearly erroneous," then any "delay" occasioned by petitioners' choice to continue pursuit of this groundless claim in the state courts should not be of concern to this Court.

It is apparant that petitioners faced a logical dilemma they were unable to resolve in drafting their Petition. If they are to successfully contend the state law question is certain they must both demonstrate that either the District Court's opinion or Judge Reinhardt's opinion is correct and then also demonstrate

how the other opinion is so incorrect it may be entirely disregarded as creating no uncertainty as to the resolution of the state law question.

Instead of identifying which opinion correctly resolved the state law question, petitioners attack a strawman by claiming the Court of Appeals found uncertainty only because the City disagreed with the District Court's interpretation. Plainly, however, the Court of Appeals itself carefully reviewed the complex questions of interpretation of the interrelated provisions of the "deemed approved" statute, the California Subdivision Map Act, and the California Environmental Quality Act. See Petition, App. at A-7 to A-14.

While the Court of Appeals found the District Court's reasoning was "somewhat opaque" (Petition, App. at A-10, n. 12) it was reluctant to find, as did the dissent, that the District Court's reasoning was "clearly erroneous" (Petition, App. at A-17).

III.

IT IS PETITIONERS' OWN LITIGATION STRATEGY WHICH HAS RESULTED IN THE DELAY IN REACHING JUDGMENT ON THE CONSTITUTIONAL ISSUES OF WHICH PETITIONERS' NOW COMPLAIN

In the 1979 trial of the constitutional "inverse condemnation" claims petitioners contended that,

because they would not realize a profit from development of the nine unit subdivision permitted by the City's general plan, their property had been "taken" without just compensation. Petitioners' appraiser testified that a nine-lot subdivision would have cost somewhat over three million dollars to develop in 1977. RT (1979) at 201. He testified that such lots could be sold at $350,000 each (Ibid.) resulting in total projected sales revenues of $3,150,000. (Hence his "no value" opinion cited in the Petition at 4.) However, the petitioners' appraiser, the City's appraiser, and Mr. Kollsman all agreed at trial that property values in the area literally doubled

between 1977 and 1979 (RT (1979) at 154, 763 and 888), so that sales revenues would have been considerably higher by the time lots were actually developed and ready for sale, had development begun in 1977.

Moreover, petitioners' appraiser also testified that the access road for the nine-unit subdivision would also greatly improve access to the existing villa on the land petitioners would retain. RT (1979) at 160. That improved access was valued at $500,000 in petitioners' offer of proof. RT (1979) at 164-168.

Thus, according to petitioners' own erroneous legal theory of inverse condemnation and their own evidence in the 1979 trial they would have

achieved a handsome net gain had they proceeded to develop their property in conformance with the City's land use regulations.[3/]

It is against this background that on March 21, 1980 petitioners filed a post-trial "Motion to Reopen to Submit Additional Evidence" which inter alia, raised for the first time the claim that their proposed 70 lot subdivision

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3/ Petitioners' "taking" theory is erroneous because the proper test is not whether a profit can be made on 85 acres, but whether the entire 120 acre property retains substantial value as regulated. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The City presented uncontroverted testimony that the value of the entire 120 acre holding, including the existing 9,800 square foot villa and associated buildings (RT (1979) at 68-71), as regulated was $1,380,000 in 1977. RT (1979) at 764-766.

was approved by operation of state law.[4/] CR 153. The City opposed this motion. CR 155. The successful motion to reopen is the sole reason the 1979 inverse condemnation trial did not proceed to judgment on the federal constitutional issues in the District Court. After the motion to reopen was filed it took the District

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4/ Petitioners asserted their subdivision had been approved by operation of law on January 1, 1979, a date three months before the first day of trial. CR 179 at 4, para. 97. Plainly this "deemed approved" claim could and should have been raised at trial. Petitioners' own theory virtually ignored the existence of the City's November 22, 1978 "Determination of Incompleteness of Application" which played such a central role in the alternative "deemed approved" theory devised, sua sponte, by the District Court.

Court three more years to decide the complex state law question presented, including two further days of testimony in 1981. Petitioners did not oppose entry of a final judgment on only the state law question pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[5/] Petition, App. D.

Petitioners have only themselves to blame for the five year "delay" of resolution of the federal issues that their fruitless pursuit of the state issue has caused. Should they choose

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5/ Please see CR 185 wherein, in 1982 before the District Court issued its memorandum decision, petitioners advocated a "separate trial for loss of use damages" to be held after the subdivision project was completed.

now to pursue this theory, which Judge Reinhardt found to be "clearly erroneous," in state court they cannot reasonably complain that such a litigation strategy will occasion a further "delay" of resolution of the federal claims. Petitioners' highly unusual offer to "forego" further litigation of their state claim (Petition at 6) should properly be presented to the District Court upon remand from the decision of the Court of Appeals, and should not be presented in a petition to this Court.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 84-883

In the Supreme Court of the United States

October Term, 1984

EVA KOLLSMAN, CITY NATIONAL BANK,
as Special Administrators of the Estate of
Paul Kollsman, deceased,

Petitioners,

v.

CITY OF LOS ANGELES,
a municipal corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 84-833

In the Supreme Court of the United States

October Term, 1984

EVA KOLLSMAN, CITY NATIONAL BANK,
as Special Administrators of the Estate of
Paul Kollsman, deceased,

Petitioners,

v.

CITY OF LOS ANGELES,
a municipal corporation,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

The City's Brief in Opposition is a classic of evasion and obfuscation.

The central substantive issues in this case are Constitutional. They are related to the issues now pending in this Court in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, No. 84-4, and deal with the Federal

Constitutional rights of a property owner whose ability to make economically viable use of his land has been destroyed by local government regulation.[1]

Rather than deny the unfairness of its action,[2] or deal directly with the Ninth Circuit's attempt to make abstention " . . . the absolute rule . . . " in cases such as this (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 844 [App A, p A-30]; Reinhardt, J., dissenting), the City attempts to divert this Court's attention.

The largest part of the City's brief attempts to place the blame for any delay on Mr. Kollsman's lawyers because they brought a state law issue to the attention of the District Court. However, when the case had been under submission without decision for nearly a year after trial and, in the interim, new statutes had been enacted, wasn't it the obligation of counsel (as officers of the court) to bring the statutes to the court's attention? How does that excuse the City's actions? How does it justify the Ninth Circuit's determination to create its own body of abstention law which is at odds with the decisions of this Court and the other Circuits?

The City's brief demonstrates the need for this Court's intervention to protect the rights of litigants to have timely Federal decisions in cases whose primary focus is on Federal questions.

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[1] Please recall that the City's appraiser as well as Mr. Kollsman's appraiser testified that the regulations rendered the 85 acre subject property useless. (See Pet., p 4.)

[2] The most the City is able to do is assert that inflation coupled with the passage of time may have supplied some relief from the City's stringent restrictions. (See Br. in Opp., pp 24-25.) The City overlooks that inflation affects construction costs as well as sale prices. Moreover, the effect of the City's actions must be measured as of the date of their occurrence. Inflation hardly seems a Constitutional solution to unconstitutional deprivations.

THE NINTH CIRCUIT'S ABSTENTION DECISIONS ARE OUT OF TOUCH WITH THOSE OF THIS COURT AND OTHER CIRCUITS

No Other Circuit Holds Constitutional Cases Involving Land Use To Be *Automatically* "Sensitive"

In 1976, the Ninth Circuit held that a Constitutional case about land use involved sensitive issues of local concern. (*Rancho Palos Verdes Co. v. City of Laguna Beach* [9th Cir 1976] 547 F 2d 1092, 1094) While such a holding *may* have been appropriate under the facts of *that* case, at *that* point in the development of California land use law, and at *that* point in the development of Federal law relating to the consequences of overly restrictive land use regulations,[3] it has since been repeated by the Ninth

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[3] *Rancho Palos Verdes* was based in part on a concern for government entities whose stringent land use regulations " . . . may unwittingly have resulted in a seizure of property rights that they did not intend and cannot afford." (547 F 2d at 1095) This concern for the regulator, rather than the property owner, was expressed without the benefit of this Court's more recent decisions in *Kaiser-Aetna v. U.S.* (1979) 444 US 164, *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, *Loretto v. Teleprompter Manhattan CATV Corp* (1982) 458 US 419, and *Ruckelshaus v. Monsanto Co.* (1984) ___ US ___, 81 L Ed 2d 815. As those cases make clear, the test is the effect on the owner. The issue of the appropriate remedy for property owners in such cases is, of course, now pending before this Court in *Williamson County Reg. Plan Comm'n v. Hamilton Bank*, No. 84-4.

Even when denying relief to property owners since *Rancho Palos Verdes*, this Court has expressly warned that — as a matter of Federal law — regulations cannot be countenanced when they destroy private rights in the process. (*Agins v. City of Tiburon* [1980] 447 US 255; *Penn Central Transp. Co. v. City of New York* [1978] 438 US 104)

The Ninth Circuit has not re-evaluated the underpinnings of its rule since *Rancho Palos Verdes*.

Circuit in talismanic fashion, as though *all* cases in any way dealing with land use *automatically* involve sensitive issues of local concern. (*Sederquist v. City of Tiburon* [9th Cir 1978] 590 F 2d 278, 281; *Santa Fe Land Improvement Co. v. City of Chula Vista* [9th Cir 1979] 596 F 2d 838, 840; *Isthmus Landowners Assn. v. State* [9th Cir 1979] 601 F 2d 1087, 1091; *C-Y Dev. Co. v. City of Redlands* [9th Cir 1983] 703 F 2d 375, 377; *Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 833)

That the Ninth Circuit is able to recognize exceptions to its rule (see the two cases cited at Br. in Opp., p 17) does not alter the fundamental fact that the Ninth Circuit's *rule* is an automatic finding of local sensitivity, resulting in a near uniform requirement of abstention.

No other Circuit has adopted such a rote presumption of a need for abstention.

No Other Circuit Has Attempted To Make Abstention The Rule In Any Particular Substantive Field, As The Ninth Circuit Has In Land Use Cases Involving Constitutional Issues

In their Petition, the Kollsman heirs noted that when other Circuits confront the substantive problem at bench, they treat each case individually, as this Court has taught, with no preconceived notion of abstention. (See cases cited at Pet., p 14.)

The City suggests that other Circuits act just as the Ninth Circuit does, citing five cases. (Br. in Opp., p 16)

The City is wrong. In each case, individualized treatment is apparent.

Startlingly, in two of the cited cases, District Court *abstention orders were reversed* by the Third and Eleventh Circuits. (*Heritage Farms, Inc. v. Solebury Township* [3d Cir 1982] 671 F 2d 743; *Nasser v. City of Homewood*

[11th Cir 1982] 671 F 2d 432) *Heritage* and *Nasser* support the Petitioners' position, not the City's.

The remaining cases do not aid the City. The do *not* demonstrate the reflex abstention facing property owners in the Ninth Circuit. While the courts *did* abstain in those cases, it was only after a particularized examination of the facts and issues. In *none* was local sensitivity *presumed* as it is by the Ninth Circuit.

The Kolisman heirs do not suggest that abstention can *never* be appropriate under existing law. The point is that the Ninth Circuit has attempted to evade its responsibility to decide cases appropriately brought before it by, as Judge Reinhardt's dissent cogently puts it, making abstention "... the absolute rule..." (737 F 2d at 844 [App A, p A-30])

That action by the Ninth Circuit mocks this Court.

No Other Circuit Finds Local Statutes "Unclear" Solely Because The Lawyer Who Lost In The District Court Says He Disagrees With The District Court

The City repeatedly asserts that the Ninth Circuit's finding of a lack of clarity in state law was the result of careful study. (Br. in Opp., pp 14, 22)

But the City's *ipse dixit* cannot make it so.

The Court of Appeals' opinion clearly reveals that it did no more than find conflict between the District Court's analysis and the City's:

> "The uncertainty of state law issues is illustrated by comparing the reasoning of the district court with the City's arguments before this court." (737 F 2d at 834 [App A, p A-8)

Judge Reinhardt's dissent confirms this non-analysis. (See 737 F 2d at 838-839 [App A, at p A-18] [quoted at Pet, p 16].) Judge Reinhardt was present during the Court's internal deliberations. His assessment is undoubtedly more valid than the City's.

No other court has used this superficial, hypothetical method of analysis. (Compare, e.g., *Hawaii Housing Auth*, ____ US ____, 81 L Ed 2d at 195.)

STATE LAW IS CLEAR

The City repeatedly seeks to demonstrate the "unclear" nature of state law by contrasting the District Court's analysis with that of Judge Reinhardt's dissent and then chiding the Petitioners for failing to indicate which analysis they believe is correct. (Br. in Opp., pp 8-9, 18-23)

The problem with the City's position is that there is no *legal* dispute between the District Court and Judge Reinhardt. Rather, Judge Reinhardt's disagreement with the District Court was *wholly factual,* as his dissenting opinion repeatedly states:

> "Rather, the case turns principally on a *factual* issue with a painfully obvious answer." (737 F 2d at 837 [App A, p A-15]; emphasis added.)

(See also 737 F 2d at 838, 840, 842, 843 [App A, pp A-17, 21, 26, 28.)

The City's argument is no more than a smokescreen to obscure the real issues before this Court.

THE NINTH CIRCUIT HAS VACATED SEVEN YEARS OF FEDERAL LITIGATION AND ORDERED PARTIAL LITIGATION IN THE STATE COURTS WITHOUT ANY GUIDANCE AS TO WHAT ISSUES REQUIRE STATE ADJUDICATION

One of the problems with the way the Ninth Circuit determined that state law was unclear (i.e., cataloguing the City's disagreement with the District Court's analysis and listing all the red herring issues conjured up by the City and its amici) is that there is no clue as to what state issues are important to determine.

Nor is this case an isolated instance in Ninth Circuit jurisprudence. In *Newport Investments, Inc. v. City of Laguna Beach* (9th Cir 1977) 564 F 2d 893, 895, the Ninth Circuit expressly *refused* to tell the litigants what state issues required state determination.

In such a situation, the plaintiff is thrust into an unwanted vehicle and set adrift in undesired waters with neither chart nor compass. Please recall that, in abstention cases, the plaintiff doesn't want to litigate *any* issues in state court. In many cases — including this one — the plaintiff isn't even sure what issues require state court litigation.

The majority opinion at bench simply lists each issue that the fertile minds of the City Attorney and his three Amici Curiae could dream up and notes that this blizzard of questions somehow creates a lack of clarity in state law.

On the other hand, Judge Reinhardt's dissent *analyzed* that laundry list of issues and concluded that *none* required state court adjudication.

What is one to do? What is to be the scope of the state trial?[4]

It hardly seems helpful to say, as the Ninth Circuit did in *Newport Investments,* 564 F 2d at 895, that the state courts are " . . . fully capable . . ." of figuring out what issues they should decide.

Such a cavalier attitude flies in the face of this Court's philosophy expressed in *England v. Louisiana Medical Examiners* (1964) 375 US 411, 418, that, because of the delay and expense caused by abstention, the abstention doctrine and its working rules should be evidenced by a " . . . line drawn . . . bright and clear . . ."

Here, there is no line at all, let alone one that is " . . . bright and clear . . ."

It is unfair to the litigants and to both judicial systems for a Court of Appeals to issue an oracular order to go elsewhere and litigate some issues for a while.

If the abstention doctrine is to serve its purposes and minimize the grief and expense attendent upon its application, it hardly seems unreasonable to require the remanding court to specify the issues being remanded. Only that court knows why it ordered abstention.

THE PETITIONERS HAVE NO "CHOICE" BUT TO WASTE ADDITIONAL YEARS LITIGATING IN BOTH STATE AND FEDERAL COURTS. THE COURT OF APPEALS SO *ORDERED*

In a startling display of jurisdictional ignorance, the City repeatedly suggests that the Kollsman heirs have

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[4]This is not a case in which there is already a state case pending. A complaint would need to be drafted in compliance with the Court of Appeals' opinion. But what must it include?

some "choice" whether to pursue litigation in the state courts or not,[5] and that the District Court might have the ability to eliminate the state court litigation.[6]

One thing should be clear: If they possess the stamina and financial ability to persevere, Mr. Kollsman's heirs will litigate in the state courts for one reason only: BECAUSE THE COURT OF APPEALS SO *ORDERED*. On this issue, the opinion is quite clear:

> "We conclude, therefore, that *abstention is required* in this case." (*Kollsman v. City of Los Angeles* [9th Cir 1984] 737 F 2d 830, 837 [App.A, pp A-14, A-15]; emphasis added.)

It is not within the power of the Kollsman heirs or the jurisdiction of the District Court to disregard the Ninth Circuit's direct order.

If the City is offering to stipulate that this Court remand the case to the Court of Appeals for the purpose of amending its opinion to order the District Court to proceed to enter judgment on the federal issues, the Kollsman heirs are willing to accept. Such a solution

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[5] " . . . any 'delay' occasioned by petitioners' *choice* to continue pursuit of this groundless claim in the state courts should not be of concern to this Court." (Br. in Opp., p 21; emphasis added.)

"Should they *choose* now to pursue this theory, which Judge Reinhardt found to be 'clearly erroneous,' in state court they cannot reasonably complain that such a litigation strategy will occasion a further 'delay' of resolution of the federal claims." (Br. in Opp., pp 28-29; emphasis added.)

[6] "Petitioners' highly unusual offer to 'forego' further litigation of their state claim (Petition at 6) should properly be *presented to the District Court* upon remand from the decision of the Court of Appeals, and should not be presented in a petition to this Court." (Br. in Opp., p 29; emphasis added.)

would resolve (for them) the problems they have asked this Court to resolve. But such a solution can be achieved only by this Court's remand to the Court of Appeals.

CONCLUSION

The Ninth Circuit's abuse of the abstention doctrine needs this Court's attention. Its determination to avoid decision of cases challenging land use planning and zoning regulations on Federal Constitutional grounds has led it to invent rules which fly in the face of decisions of this Court and other Courts of Appeals.

Such rules abuse the parties and both judicial systems. They manifoldly increase the cost of litigation and delay its outcome. The case at bench is already seven years old. When will it end? The *Sederquist* litigation has consumed ten years because of a similar order. It is not yet concluded. (See *Sederquist v. City of Tiburon* [9th Cir 1978] 590 F 2d 278; *Sederquist v. City of Tiburon* [9th Cir 1984] ____ F 2d ____.) It is the rarest litigant who can be expected to endure this kind of lengthy, expensive shuttling between judicial systems. That is not a system of justice.

It is time for this Court to call a halt to the Ninth Circuit's peculiar brand of abstention and allow the District Courts in this Circuit to perform their traditional roles as protectors of Federal Constitutional rights.

The Kollsman heirs pray that the Petition be granted.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 11, 1985, I served the within *Reply Brief In Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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